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Supreme Court, U.S.
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In The

Supreme Court of the United States

FRANK SINATRA, JR.,

Petitioner,

v.

BARRY KEENAN,

Respondent.

On Petition For Writ Of Certiorari To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of California erred in holding that California Civil Code § 2225(b)(1), which provides for the appropriation of all proceeds owing to a convicted felon for the depiction, portrayal, or reenactment of the felony for which the criminal was convicted, is overinclusive and thus facially invalid under the First Amendment.

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OPINIONS BELOW

Petitioner Frank Sinatra, Jr., has included in the Appendix the following orders and opinions: (1) the Supreme Court of California's published opinion in *Keenan v. Superior Court*, 27 Cal.4th 413, 40 P.3d 718, 117 Cal.Rptr.2d 1 (Cal. 2002); (2) the California Court of Appeal's earlier published decision in *Keenan v. Superior Court*, reported at 85 Cal.Rptr.2d 417 (Cal. App. 1999); and (3) the California Superior Court's Minute Order of December 12, 1998.

STATEMENT OF JURISDICTION

The Supreme Court of California entered its judgment on February 21, 2002. On March 26, 2002, the Supreme Court of California issued its remittitur. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 and Rule 10(b) of the Supreme Court of the United States.

CONSTITUTION, STATUTES, OR REGULATIONS

Because of the length of the relevant constitutional provisions and statutes, the pertinent text is set forth in the Appendix. These authorities consist of the First and Fourteenth Amendments to the United States Constitution and California Civil Code § 2225.

STATEMENT OF THE CASE

Respondent Barry Keenan kidnapped Petitioner Frank Sinatra, Jr., in 1963. Petitioner was held captive until his father paid a ransom. Respondent was later apprehended, tried, and convicted of the felony offense of kidnapping.

Following Respondent's eventual release from prison, Petitioner Sinatra learned that Respondent had entered into an arrangement with New Times, Inc., the publisher of a tabloid magazine. Respondent was then interviewed by Peter Gilstrap, a reporter for New Times Los Angeles magazine, about his kidnapping of Petitioner Sinatra. The interview was offered for sale to the media, with the profits to be shared by Respondent, New Times, and Gilstrap. An article entitled *Snatching Sinatra,* authored by Gilstrap, appeared in the January, 1998, issue of New Times Los Angeles. Shortly thereafter, Respondent, New Times, and Gilstrap sold the movie rights to *Snatching Sinatra* to Columbia Pictures for as much as $1.5 million.

Petitioner Sinatra objected to Columbia Pictures' payment of money to his kidnapper, by invoking California Civil Code § 2225.[1] Petitioner Sinatra sought to have

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[1] Civil Code § 2225 provides, in part, that "[a]ll proceeds from the preparation for the purpose of sale, the sale of rights to, or the sale of materials that include or are based on the story of a felony for which a convicted felon was convicted, shall be subject to an involuntary trust for the benefit of the beneficiaries set forth in this section. That trust shall continue until five years after the time of payment of the proceeds to the felon or five years after the date of conviction, whichever is later. If an action is filed by a beneficiary to recover his or her interest in a trust within those time limitations, the trust character of the property shall continue until the conclusion of the action. At the end of the five-year trust period, any proceeds that remain in trust that have not been

(Continued on following page)

Columbia Pictures withhold from the kidnapper, and from New Times and Gilstrap, any money to be paid for the motion picture rights. When Columbia Pictures refused to withhold the money without a court order, Petitioner Sinatra filed this action in state court. One week later, Petitioner Sinatra sought and obtained a preliminary injunction directing Columbia Pictures to withhold any money due to Respondent, and Gilstrap and New Times, pending the resolution of Petitioner Sinatra's challenge.

Respondent demurred and moved to dissolve the preliminary injunction, contending that Civil Code § 2225(b)(1) violated his free speech rights. The trial court rejected Respondent's arguments, overruled his demurrer, denied his motion to dissolve the preliminary injunction, and directed him to answer Petitioner Sinatra's complaint.

Respondent then filed a petition for a writ of mandate in the California Court of Appeal, asking the appellate court to reverse the trial court. The Court of Appeal

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claimed by a beneficiary shall be transferred to the Controller. . . . " (§ 2225, subd. (b)(1).) "'Convicted felon' means any person convicted of a felony, or found not guilty by reason of insanity of a felony committed in California, either by a court or jury trial or by entry of a plea in court." (§ 2225, subd. (a)(1).) "'Beneficiary' means a person who, under applicable law, other than the provisions of this section, has or had a right to recover damages from the convicted felon for physical, mental, or emotional injury, or pecuniary loss proximately caused by the convicted felon as a result of the crime for which the felon was convicted." (§ 2225, subd. (a)(4)(A).) "'Materials' means books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind." (§ 2225, subd. (a)(6).) "'Story' means a depiction, portrayal, or reenactment of a felony and shall not be taken to mean a passing mention of the felony, as in a footnote or bibliography." (§ 2225, subd. (a)(7).)

affirmed the trial court and held that Civil Code § 2225(b)(1) does not infringe constitutional rights of free speech. More specifically, the Court of Appeal concluded that the California statute comports with the constitutional requirements set forth by this Court in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

Respondent sought review in the Supreme Court of California. The state high court granted review, and reversed the judgment of the California Court of Appeal. The Supreme Court of California concluded that Civil Code § 2225(b)(1) was unconstitutional in light of *Simon & Schuster*.

SUMMARY OF ARGUMENT

The opinion of the Supreme Court of California conflicts with this Court's decision in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991). In *Simon & Schuster*, this Court considered a New York law that sought to prevent criminals from profiting from their crimes. This Court declared the New York statute unconstitutional because of two specific flaws of overinclusiveness. The Supreme Court of California, relying exclusively on *Simon & Schuster*, improperly declared the California statute facially unconstitutional. The California statute does not possess the flaws identified in *Simon & Schuster*, and instead is narrowly tailored to serve a state's compelling interests in compensating the victims of crime and preventing convicted felons from profiting from their crimes.

The Supreme Court of California's decision specifically countermands this Court's directive in *Simon & Schuster* that its holding is not intended to invalidate all such victims' rights statutes. A finding that Civil Code § 2225(b)(1) is facially unconstitutional based upon *Simon & Schuster*, notwithstanding the absence of the specific flaws cited by this Court from the New York statute, is precisely the effect which this Court expressly sought to avoid. Worse, if the California decision is not corrected, it will compel that same result in the other forty (40) states with similar victims' rights statutes.

Finally, the Supreme Court of California's decision erroneously protects a convicted felon's expression that contains a depiction, portrayal, or reenactment of his crime if the criminal merely augments his depiction of his or her crime with additional text. The California Court's decision, in short, makes it impossible for any state legislature to tailor a remedy that meets its compelling interests in preventing criminals from profiting from their crimes and compensating victims of crimes from the proceeds of the crime.

ARGUMENT

THE SUPREME COURT OF CALIFORNIA HAS MISINTERPRETED AND MISAPPLIED THIS COURT'S DECISION IN *SIMON & SCHUSTER, INC. v. MEMBERS OF N.Y. STATE CRIME VICTIMS BD.*, 502 U.S. 105 (1991), IN INVALIDATING CIVIL CODE SECTION 2225(b)(1).

The Supreme Court of California specifically found that "the analysis of *Simon & Schuster* governs this case

and renders Civil Code § 2225(b)(1) invalid" *(Keenan v. Superior Court*, 27 Cal.4th 413, 423, 40 P.3d 718, 725, 117 Cal. Rptr. 2d 1, 10 (Cal. 2002)), but the state supreme court's ruling misconstrues this Court's guiding decision in *Simon & Schuster*. The state court's holding also portends that other states' version of this statute will similarly be deemed unconstitutional based upon the same misreading of *Simon & Schuster*. *Certiorari* should therefore be granted in this case to confirm that California's law properly separates criminals from the profits of their crimes and complies with the First Amendment, and avoid a precedent that may lead other states to misapply *Simon & Schuster* as an invalidation of all similar victims' rights statutes.

This Court specifically cautioned that the decision in *Simon & Schuster* regarding the New York law at issue there should not be applied mechanically to another state's version of a victims' rights statute. With this admonition, *Simon & Schuster* offered direction as to the elements of a valid statute. California's law complies with that direction by omitting the two specific defects found in the New York law, and being narrowly tailored to serve the compelling state interests presented here.

The California court expressly acknowledges that the California law lacks the New York law's pitfalls, but still rejects Petitioner's claim that Civil Code § 2225's elimination of the two cited flaws in the New York statute will not cure the overinclusiveness problem identified in *Simon & Schuster*. *Keenan v. Superior Court*, *supra*, 27 Cal.4th at 432. Instead, the California court held that this Court had merely "*illustrated* the overbroad sweep of the New York statute" by specifying these two flaws, concluding that "we do not read *Simon & Schuster* as suggesting that a statute

which exhibited marginal narrowing in these particular regards would necessarily pass constitutional muster." *Id.*, at 433; emphasis by the court. In fact, the California court went further in erroneously finding that "the basic rationale of *Simon & Schuster*" is to invalidate any statute that confiscates profits from works based substantially from the story of the crime. *Id.*, at 435. Indeed, the California court repeatedly references the California statute as California's "Son of Sam law," which was the invalidated New York statute, as opposed to its proper description as California's "victims' rights statute."

Petitioner submits that *Keenan v. Superior Court* conveys the erroneous assumption that all victims' rights statutes – statutes intended to compensate crime victims through the use of the proceeds of the crimes derived from the sale of the story – will be inevitably declared unconstitutional. While this Court admonished that its decision in *Simon & Schuster* was not intended to determine the constitutionality of all victims' rights statutes, the California Supreme Court has to the contrary applied the *Simon & Schuster* case. Insofar as that error is based upon a misinterpretation of *Simon & Schuster*, *certiorari* should be granted to resolve this issue.[2]

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[2] California Supreme Court's brief reference to the state constitution (27 Cal.4th at 436) does not divest this Court of jurisdiction. The decision and analysis of the lower court rests exclusively upon this Court's decision in *Simon & Schuster*. The lower court cited no state law on the merits. The decision also conveys the unmistakable conclusion that, in the view of the lower court, federal law compelled the result. Under these circumstances, the mere mention of the state constitution does not demonstrate that the lower court's decision does rest on independent state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1037-1044 (1983).

A. California Civil Code Section 2225(b)(1) Is Narrowly Tailored to Further Compelling State Interests, and Is in Compliance with the Directives Set Forth in *Simon & Schuster*.

In *Simon & Schuster*, this Court examined whether New York's statute was narrowly tailored to advance the state's compelling interest in compensating victims from the fruits of crime.[3] The Court concluded that the New York law was not so tailored, for "[a]s a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly overinclusive." *Simon & Schuster*, *supra*, 502 U.S. at 121. According to *Simon & Schuster*, there were two specific features of the New York

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[3] New York statute (N.Y. Exec. Law § 632-a) included these provisions: "Every . . . legal entity contracting with any person . . . accused or convicted of a crime in [the state of New York], with respect to the reenactment of such crime, by way of a movie, book, magazine article, . . . radio or television presentation, . . . or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the [New York Crime Victims Board] and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives." (*Id.*, subd.(1).) The Board was then required to deposit the payment into an escrow account "for the benefit of and payable to any victim . . . provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such [accused or convicted] person or his representatives." (*Ibid.*) After five years from the date on which the escrow account was established, if no actions were pending, the Board was required to "immediately pay over any moneys in the escrow account to such [accused or convicted] person or his legal representatives." (*Id.*, subds. (4), (7).) A "person convicted of a crime" was defined to include "any person convicted of a crime in [the state of New York] either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." (*Id.*, subd.(10)(b).)

law that rendered it overbroad, both of which the state supreme court admitted were not present in the California statute. *Keenan v. Superior Court*, *supra*, 27 Cal.4th at 432-434.

First, the New York statute applied "to works on any subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally. [Citation.]" *Simon & Schuster*, *supra*, 502 U.S. at 121. California's law, in contrast to the New York statute, has no such flaw, which the California Supreme Court has acknowledged in its decision. *Keenan v. Superior Court*, *supra*, 27 Cal.4th at 434. Rather, the statute specifically states that depiction of a "story" does not include a "mere passing mention of the felony." Civil Code § 2225(a)(7).

This line of demarcation comports with the basic rationale of *Simon & Schuster*. In *Simon & Schuster*, this Court offered the following example: "Should a prominent figure write his autobiography at the end of his career, and include . . . a brief recollection of having stolen . . . a nearly worthless item . . . the [New York] Board would control his entire income from the book. . . ." *Simon & Schuster*, *supra*, 502 U.S. at 123. The California statute is narrowly tailored to prevent this particular scenario. The California statute applies only when an expressive work provides narrative detail about a felony offense for which the work's author was convicted. To fall within the statute's purview, therefore, the work must go so far as to tell the "story" of the felony offense by means of a vivid depiction, portrayal or reenactment. It does not prohibit the mere acknowledgment of a prior felony conviction in the context of another subject. Nor does it affect expressive works that

have little or no relationship to the exploitation of the creator's misdeeds.

Significantly, the facts of the present case illustrate the merit of the statute. Respondent's serious crimes are the very source of his "work." Even the title of the "work" ("*Snatching Sinatra*") references Respondent's felony offense of kidnapping and exploits his prominent victim. California's law targets a felon as Respondent whose "work" is dominated by its portrayal of his victimization of Petitioner. Thus, the first flaw of the New York statute, allowing for confiscation of all profits from an expressive work that only tangentially or incidentally mentions a past offense, is not present here.

The second flaw identified in *Simon & Schuster* derived from the New York statute's broad definition of a "person convicted of a crime." That standard allowed New York to escrow the income of someone who simply admitted the commission of acts which could have been punishable as a crime, regardless of the level of the offense or whether a conviction had even been sought, much less secured. California's Civil Code § 2255, in contrast, applies only to persons prosecuted and found guilty of felonies committed in California. Civil Code § 2225, subd. (a)(1), (2). This insistence upon a felony conviction insures that income from an expressive work will not be confiscated simply for inclusion of a past transgression that was minor. Thus, California's statute, unlike New York's law, presents no danger that an innocent person will be penalized, as again acknowledged by the Supreme Court of California. *Keenan v. Superior Court*, *supra*, 27 Cal.4th at 432-433.

The limitations imposed by Civil Code § 2225 avoid the constitutional flaws condemned in *Simon & Schuster*. California's law, unlike the New York version, is narrowly tailored to insure that the fruits of crime are not retained by a convicted felon in exploitation of the crime, but rather are used to compensate the victims of crime. Accordingly, the Supreme Court of California erred in concluding that Civil Code § 2225(b)(1) shares the same flaws of the New York law at issue in *Simon & Schuster*.

B. The Supreme Court of California's Decision Frustrates the State's Compelling Interest in Depriving Criminals of the Profits of Their Crimes by Protecting a Convicted Felon's Expression That Contains a Depiction, Portrayal, or Reenactment of His Crime Simply Because He Has Augmented That Depiction with Additional Text.

This Court has recognized that states have a compelling interest in depriving criminals of the profits of their crimes. As this Court observed in *Simon & Schuster*, "every State has a body of tort law serving exactly this interest." *Simon & Schuster*, *supra*, 502 U.S. at 118. California Civil Code § 2225(b)(1) furthers that compelling state interest. Those points are undisputed in this case. The constitutional issue presented by this appeal is limited to one question: whether a convicted felon's right to receive proceeds from otherwise protected expression may be lost where it includes, as the California Supreme Court stated, "significant discussions" of the felony for which he was convicted. *Keenan v. Superior Court*, *supra*, 27 Cal.4th at 423. Petitioner asserts that it can, as this Court in *Simon & Schuster* based its free speech concerns

upon the prospect that "tangentially or incidentally" mentioning the crime would bring a story within the statute, a fate avoided by the California statute. *Simon & Schuster*, *supra*, 502 U.S. at 121. Since the California statute avoids the concerns addressed in *Simon & Schuster*, Civil Code § 2225(b)(1), which reaches the proceeds from the tainted expressions, is not overinclusive. Therefore, the state court's decision was error and must be reversed.

Furthermore, expression that on its own is subject to a narrowly tailored regulation does not alter its character merely because the felon has augmented his depiction of his crimes with additional text. That additional information does not purify the telling of the felony. The state court's decision to single out and protect this type of exploitative depiction deals a fatal blow to a state's legislative ability to serve its compelling interest in preventing convicted felons from profiting from their crimes. If the mere addition of text immunizes the felon, then no victims' rights statute of any state will have any meaningful effect.

The state court's concern that the California statute "discourages the discussion of crime in nonexploitative contexts" (*Keenan v. Superior Court*, *supra*, 27 Cal.4th at 435) ignores the overarching fact that a convicted felon who derives monetary profit from the depiction of his criminal acts has exploited the crime, regardless of whether one may attribute additional nonexploitative motivation to the criminal. This Court's concern expressed in *Simon & Schuster* did not pertain to the effect of a statute on the fruits of the crime derived from the retelling of the story, but rather the inclusion of mere tangential or incidental references to a crime, which may improperly infringe upon certain literary works. Yet, the California

Supreme Court has interpreted *Simon & Schuster* as invalidating all statutes which seek to recover the fruits of a felon's crime from retelling his or her story.

The state court's holding is self-defeating. The state court held:

> "[The California statute and the New York statute] are *overinclusive* . . . because they confiscate all income from all expressive materials, whatever their general themes or subjects, that include significant discussions of their creator's past crimes."

Keenan v. Superior Court, *supra*, 27 Cal.4th at 423; emphasis added by the court. As has been shown above, income from expressive materials that contain "significant discussions" of past crimes is the exact type of exploitation the state has a compelling interest in preventing. That the statute would reach this type of exploitative depiction is expected, in conformity with its limited purpose and follows the reasoning in *Simon & Schuster*.

The fact that a statute reaches expressive material containing "significant discussions" of past crimes does not render it facially invalid under the First Amendment. The California statute does not prohibit speech. It only seizes the profits that are generated as a result of exploitation of the specific crime for which the felon was convicted. Such content-based regulation is valid if it is narrowly drawn to serve a compelling state interest. *Keenan v. Superior Court*, *supra*, 27 Cal.4th at 423-424. Civil Code § 2225(b)(1), as has been shown above, is so narrowly drawn.

The state court's citation to the writings of Alex Haley and Malcolm X, Eldridge Cleaver, Charles Colson, G.

Gordon Liddy, John Dean and Patricia Hearst as works that include discussions of crimes and thus would be affected by the statute (*Keenan v. Superior Court*, *supra*, 27 Cal.4th at 435, fn. 20) does not support a conclusion of facial invalidity. Leaving aside the genuine question of whether any of these works meet the jurisdictional requirements of the statute, whether these writings contain a "depiction, portrayal, or reenactment" of crimes is a question of fact to be decided on a case-by-case basis.

If those authors noted their past crimes among "larger subjects," the statute would not be offended. It would only come into play if the crimes were "depicted, portrayed, or reenacted" – a question of fact. In this way, the statute specifically avoids the content-based judgment employed by the Supreme Court of California when it selected certain authors as worthy of protection. The statute draws no such distinction, but instead properly restricts itself to separating a convicted felon from his profits. Celebrity status or literary fame should not excuse a convicted felon or allow him to exploit his crimes. Further, writings whose value derives from their depiction of the author's crimes constitute an exploitation of those crimes and do rightfully fall within the statute's purview.

For these reasons, the Supreme Court of California erred in holding Civil Code § 2225(b)(1) overinclusive and facially invalid.

CONCLUSION

Accordingly, Petitioner Frank Sinatra, Jr., respectfully requests that *certiorari* be granted.

Dated: May 22, 2002

Respectfully submitted,

CORBETT & STEELMAN

RICHARD B. SPECTER
Counsel of Record
Counsel for Petitioner

27 Cal.4th 413

BARRY KEENAN, Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; FRANK SINATA, JR., Real Party in Interest.

No. S080284.

Supreme Court of California

Feb. 21, 2002.

COUNSEL

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Dilan A. Esper; Peter J. Eliasberg and Mark D. Rosenbaum for ACLU Foundation of Southern California as Amicus Curiae on behalf of Petitioner.

Weil, Gotshal & Manges, R. Bruce Rich, Jonathan Bloom, Heather R. Goldstein, Josh A. Krevitt and Christopher J. Cox for The Association of American Publishers, Inc., The American Booksellers Foundation for Free Expression, Magazine Publishers of America, Inc., and PEN American Center as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

Corbett & Steelman, Richard B. Specter and Mark M. Monachino of [sic] Real Party in Interest.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Carole Ritts Kornblum, Assistant Attorney General, Peter K. Shack and Kelvin C. Gong, Deputy Attorneys General, as Amici Curiae on behalf of Real Party in Interest.

BAXTER, J.

We confront a claim that California's "Son of Sam law" facially violates constitutional protections of speech by appropriating, as compensation for crime victims, all monies due to a convicted felon from expressive materials that include the story of the crime. We conclude that these provisions of the California statute are facially invalid under both the free speech clause of the First Amendment to the federal Constitution[1] as applied to the states through the Fourteenth Amendment, and the liberty of speech clause of the California Constitution (art. I, § 2, subd. (a)).[2]

The California law was first enacted in 1983 as Civil Code section 2224.1.[3] (Stats. 1983, ch. 1016, § 2, pp. 3581-3584.) In 1986, the law was renumbered as section 2225 (Stats. 1986, ch. 820, §§ 7, 8, pp. 2730-2733), and it has since been amended on several occasions (see Stats. 1992, ch. 178, § 2, p. 882; Stats. 1994, ch. 556, § 1, p. 2823; Stats. 1995, ch. 262, § 1; Stats. 2000, ch. 261, § 2). As currently in effect, the law seeks to prevent a convicted felon, or a

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[1] "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

[2] "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).)

[3] All statutory references are to the Civil Code unless otherwise stated.

profiteer, from exploiting the felon's crimes for financial gain while victims of crime go uncompensated.

One prong of the California statute, in effect since the law's inception, imposes an involuntary trust, in favor of damaged and uncompensated crime victims as "beneficiar[ies]," on a convicted felon's "proceeds" from expressive "materials" (books, films, magazine and newspaper articles, video and sound recordings, radio and television appearances, and live presentations) that "include or are based on" the "story" of a felony for which the felon was convicted, except where the materials mention the felony only in "passing . . . , as in a footnote or bibliography." (§ 2225, subds. (a)(4), (6), (7), (9), (b)(1); see former § 2224.1, subds. (a)(4), (6), (7), (9), (b), Stats. 1983, ch. 1016, § 2, p. 3581.) For convenience, we sometimes hereafter refer to this portion of the statute, governing proceeds from expressive materials that include the story of the crime, by its operative provision, section 2225, subdivision (b)(1) (section 2225(b)(1)).

More recent amendments to the California statute attack the financial exploitation of crime from a second, distinctly different angle. Since 1994, the law's involuntary trust provisions have also applied to "profits" received by the felon, or his or her representative, from the sale or transfer of *any* "thing" or "right," the *value* of which "is *enhanced* by the *notoriety* gained from the commission of a felony for which a convicted felon was convicted." (§ 2225, subd. (a)(10), italics added; see also *id.*, subd. (b)(2).) In 2000, the involuntary trust provisions were further extended, with limited exceptions, to "profiteer[s] of the felony," i.e., "any person[s]" who derive income by selling memorabilia, property, rights, or things for values enhanced by their felony-related notoriety. (§ 2225, subds.

(a)(3)(B), (10), (b)(2)). As necessary, we sometimes hereafter refer to this prong of the statute, governing profits from things sold for their felony-related notoriety value, by its operative provision, section 2225, subdivision (b)(2) (section 2225(b)(2)).[4]

In 1991, the United States Supreme Court held that a somewhat similar New York law violated the First Amendment. (*Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.* (1991) 502 U.S. 105 [112 S.Ct. 501, 116 L.Ed.2d 476] (*Simon & Schuster*).) In provisions somewhat like California's section 2225(b)(1), the statute at issue confiscated, for the benefit of crime victims, all monies a criminal was due under contract with respect to a "reenactment" of the crime, or from the expression of his or her personal thoughts or feelings about the crime, in a film, broadcast, print, recording, or live performance format.

Finding the New York law facially invalid, the *Simon & Schuster* majority reasoned that the statute, as a direct regulation of speech based on content, must fall unless it satisfied a strict level of constitutional scrutiny. The New York law failed this test, said the majority, because although the state had a compelling interest in compensating crime victims from the fruits of crime, the statute at issue was not narrowly tailored to that purpose. (*Simon &*

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[4]As indicated in detail below, this case does not, in fact, present a challenge to section 2225(b)(2), the distinct portion of the statute that confiscates profits from memorabilia, property, things, or rights sold for values enhanced by their felony-related notoriety value. We therefore do not address the constitutionality of this clearly severable provision. (See Stats. 2000, ch. 261, § 3.)

Schuster, supra, 502 U.S. 105, 121-123 [112 S.Ct. 501, 511-512].)

The flaw most clearly identified by the *Simon & Schuster* majority was that the New York statute was overinclusive. The majority noted two respects in which the New York law regulated speech too broadly for its compelling purpose. First, the law applied to expressive works in which one merely *admitted* crimes for which he or she had not been convicted. Second, it confiscated all profits from expressive works in which one made even *incidental or tangential* mention of his or her past crimes for nonexploitative purposes. (*Simon & Schuster, supra,* 502 U.S. 105, 121 [112 S.Ct. 501, 511].)

California's analogous provision, section 2225(b)(1), similarly imposes a content-based financial penalty on protected speech. Yet section 2225(b)(1), like its New York counterpart, fails to satisfy strict scrutiny because it, too, is overinclusive. Section 2225(b)(1) contains the fundamental defect identified in *Simon & Schuster*; it reaches beyond a criminal's profits from the crime or its exploitation to reach all income from the criminal's speech or expression on any theme or subject, if the story of the crime is included.

Though section 2225(b)(1), unlike the New York law, applies only to persons actually convicted of felonies, and states an exemption for mere "passing mention of the felony, as in a footnote or bibliography" (*id.*, subd. (a)(7)), these differences do not cure the California statute's constitutional flaw. By any reasonable construction, the California statute is still calculated to confiscate all income from a wide range of protected expressive works by convicted felons, on a wide variety of subjects and themes,

simply because those works include substantial accounts of the prior felonies.

Because we conclude, contrary to the Court of Appeal, that section 2225(b)(1) is invalid, we will reverse the judgment of the Court of Appeal.

Facts

On July 8, 1998, Frank Sinatra, Jr. (Sinatra, Jr.), son of the late singer, filed a complaint in Los Angeles Superior Court. Named as defendants were Barry Keenan, Joseph Amsler, John Irwin, Peter Gilstrap, Columbia Pictures (a division of Sony Pictures Entertainment, Inc.), and New Times, Inc. (New Times).

As pertinent here, the complaint alleged as follows: In 1963, Keenan and Amsler, acting pursuant to a conspiracy with Irwin, kidnapped Sinatra, Jr., from his Nevada hotel room and drove him to Los Angeles, where he was held until his father paid a ransom. During his captivity, Sinatra, Jr., suffered economic loss, physical suffering, and emotional distress. Keenan, Amsler, and Irwin were later apprehended, tried, convicted of felony offenses, and incarcerated under California law.[5] Following their arrests, the kidnappers made media statements, since

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[5] In a memorandum of points and authorities accompanying his subsequent motion for a preliminary injunction, Sinatra, Jr., alleged that the kidnappers sustained *federal* convictions (see 18 U.S.C. §§ 2, 371, 875(a), 1201, 1202) and served their time in the federal penitentiary, but nonetheless qualify as "convicted felons" for purposes of section 2225, because they were convicted of felonies, as defined by either California or United States statutes, that were committed in California. (§ 2225, subd. (a)(1), (2).)

admitted to be false, that Sinatra, Jr., had conspired in his own kidnapping to extract money from his father. These defamatory statements caused further damage to Sinatra, Jr.'s business and reputation.

The complaint further alleged: In January 1998, Keenan and one or both accomplices arranged with Gilstrap, or with New Times (publisher of New Times Los Angeles, a tabloid magazine), for Gilstrap to interview Keenan about the kidnapping. The purpose was to produce a story for sale to print, broadcast, and film media. Monies derived from exploiting the kidnapping story would be split among Gilstrap, New Times, and the kidnappers. An article entitled *Snatching Sinatra*, authored by Gilstrap, appeared in a January 1998 issue of New Times Los Angeles. In late January 1998 and thereafter, other magazines reported that Columbia Pictures had bought the motion picture rights to *Snatching Sinatra* for up to $1.5 million. In February 1998, citing section 2225, Sinatra, Jr., made demand on Columbia Pictures to withhold from the kidnappers, and from Gilstrap and New Times as the kidnappers' "representatives," any monies otherwise due such persons or entities for the motion picture rights. Columbia Pictures refused to do so without a court order.

The complaint asserted that under section 2225, all monies due to the kidnappers, or to their "representatives" Gilstrap and New Times, for preparation for sale of the story of Sinatra, Jr.'s, kidnapping, the sale of the rights to the story, or the sale of materials that included or were based on the story, were "proceeds" as defined by subdivision (a)(9) and "profits" as defined by subdivision (a)(10), and were thus subject to an involuntary trust in favor of Sinatra, Jr., a statutory "beneficiary" (*id.*, subd. (a)(4)(A)).

The complaint sought an order that the defendants, particularly Columbia Pictures and New Times, hold such present and future proceeds and profits in trust for Sinatra, Jr. It also sought an injunction to (1) prevent Columbia Pictures and New Times from paying such proceeds and profits to any other defendant, and (2) require that all such payments be made instead to Sinatra, Jr., to the extent of his damages or, in the alternative, to the superior court for distribution for the benefit of the victims of the kidnapping.

On August 5, 1998, after a hearing at which only Sinatra, Jr., Columbia Pictures, and New Times appeared, the trial court issued a preliminary injunction prohibiting Columbia Pictures, during the pendency of the action, from paying any monies to Keenan, Amsler, Irwin, or their representatives or assigns in connection with the motion picture rights to the story of Sinatra, Jr.'s, kidnapping.[6]

On November 19, 1998, Keenan first appeared in the action by filing, on his own behalf only, a demurrer to the complaint. At the same time, Keenan moved to dissolve the preliminary injunction. The demurrer asserted, among other things, that section 2225 was facially invalid under the speech clauses of the federal and state Constitutions. Keenan's constitutional attack was based solely on a comparison between section 2225 and the New York law struck down in *Simon & Schuster*, *supra*, 502 U.S. 105.

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[6] In his written motion for a preliminary injunction, Sinatra, Jr., had sought similar injunctive relief against New Times and Gilstrap, but prior to the August 5, 1998, hearing on the motion, Sinatra, Jr., stipulated he would not proceed at that time with the injunctive portion of his application.

In this regard, Keenan noted that because the California statute, like its New York counterpart, targeted a criminal's income from telling the story of his crime, it penalized the content of speech, required strict scrutiny, and was not narrowly tailored to compensate crime victims from the profits of crime. Keenan urged that, by the standards set forth in *Simon & Schuster, supra*, 502 U.S. 105, the California statute was both underinclusive, because it reached only expressive activity, not other sources of crime-related income, and overinclusive, because it penalized all expressive works by convicted felons which included more than passing mention of their crimes.

In response, Sinatra, Jr., asserted that the *Simon & Schuster* majority had only found New York's law overinclusive. Sinatra, Jr., argued that section 2225 solves the overinclusiveness problem identified in *Simon & Schuster* by covering only "convicted" felons and exempting expressive materials that contain only a "passing mention of [the] felony." Moreover, he contended, section 2225 is not underinclusive because it is precisely drawn to ensure that victims of crime are compensated before the felon profits from telling the story of their victimization.

On December 22, 1998, the trial court issued an order overruling Keenan's demurrer "for the reasons stated in [Sinatra, Jr.'s,] opposition papers." In the same order, the court denied Keenan's motion to dissolve the preliminary injunction, reiterating its findings, made when the injunction was granted, that "section 2225 [is] not unconstitutional as written . . . [and] . . . was narrowly drafted to overcome the over-inclusive effects found by the Supreme Court" in *Simon & Schuster*.

On December 31, 1998, Keenan filed in the Court of Appeal the instant petition for mandate or other appropriate relief. The petition requested a writ directing the superior court to vacate its orders overruling his demurrer and granting the preliminary injunction, to enter a new order sustaining the demurrer without leave to amend, and to dissolve the preliminary injunction. On January 14, 1999, the Court of Appeal stayed proceedings in the trial court, ordered the parties to appear for oral argument on the merits of the petition, and called for the filing of a return and reply.[7]

The parties' briefs in the Court of Appeal, like those in the trial court, focused entirely on comparisons between California's Son of Sam law and the New York counterpart addressed in *Simon & Schuster*. Again Keenan claimed the California statute singled out expressive activity for regulation on the basis of content, required strict scrutiny, and was both overinclusive and underinclusive by the standards set in that case. Again Sinatra, Jr., urged that section 2225 solved the *overinclusiveness* problem identified in *Simon & Schuster* because, unlike the New York statute, California's law applied only to convicted felons and exempted expressive materials which made mere "passing mention" of the felony.

The Court of Appeal denied writ relief, concluding, among other things, that section 2225 does not infringe

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[7] We deem this procedure as equivalent to an order for the issuance of an alternative writ, and the parties have proceeded under that assumption. (But see Code Civ. Proc., §§ 1086-1087; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-178 [203 Cal.Rptr. 626, 681 P.2d 893].)

constitutional rights of speech. In this regard, the Court of Appeal accepted Sinatra, Jr.'s, arguments that section 2225 lacks the defects of overbreadth identified in *Simon & Schuster*, because it is limited to convicted felons and does not confiscate a felon's proceeds from expressive materials that contain mere "passing mention" of the felony.

The Court of Appeal declined to decide whether the California statute was impermissibly underinclusive. The court reasoned it need not do so because, contrary to Keenan's insistence, *Simon & Schuster* had not expressly found the New York statute underinclusive. Because Keenan "does not otherwise elaborate on the issue of underinclusiveness," said the court, "[a]nd since [his] attack on section 2225 is limited to those issues considered in *Simon & Schuster*, our discussion of the statute is similarly limited." We granted review.[8] We now reverse.

Discussion

In the late 1970's, New York was terrorized by serial killer David Berkowitz, popularly known as the Son of Sam. By the time Berkowitz was apprehended, publicity

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[8] In addition to the parties' briefs on the merits in this court, several amicus curiae briefs have also been filed. The Attorney General of California (Attorney General) has filed an amicus curiae brief in support of Sinatra, Jr. In support of Keenan, an amicus curiae brief has been filed on behalf of the ACLU Foundation of Southern California (ACLU), and a joint amicus curiae brief has been filed on behalf of the Association of American Publishers, Inc., The American Booksellers Foundation for Free Expression, Magazine Publishers of America, Inc., and Pen American Center.

about the case had enhanced the value of the rights to his story. New York's Legislature sought to prevent Berkowitz and other notorious criminals from exploiting for profit the tales of their sensational crimes while their victims went uncompensated. The resulting statute, discussed in greater detail below, was dubbed the "Son of Sam law." (*Simon & Schuster, supra*, 502 U.S. 105, 108-110 [112 S.Ct. 501, 504-505].) In 2000, the United States and over 40 states, including California, had some form of Son of Sam law. (See Kealy, *A Proposal for a New Massachusetts Notoriety-for-Profit Law: the Grandson of Sam* (2000) 22 W. New Eng. L.Rev. 1, 22; Comment, *Son of Sam Laws: Killing Free Speech or Promoting Killer Profits?* (1999) 20 Whittier L.Rev. 949, 953, & fns. 48, 49.)[9]

California's version, as pertinent here, provides that all past and future "proceeds" (§ 2225, subds. (a)(9), (b)(1)) paid or owing to a "convicted felon" (*id.*, subds. (a)(1), (b)(1)) from the sale of expressive "materials"[10] or the rights thereto (§ 2225, subds. (a)(6), (b)(1)) are subject to an involuntary trust for designated "beneficiaries"

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[9] "Ironically, the [New York] statute was never applied to the Son of Sam himself; David Berkowitz was found incompetent to stand trial, and the statute at that time applied only to criminals who had actually been convicted. [Citation.] According to the [New York State Crime Victims] Board, Berkowitz voluntarily paid his share of the royalties from the book Son of Sam, published in 1981, to his victims or their estates. [Citation.]" (*Simon & Schuster, supra*, 502 U.S. 105, 111 [112 S.Ct. 501, 506].)

[10] Section 2225, subdivision (a)(6) defines "materials" as "books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind."

(§ 2225(b)(1)) if the materials "include or are based on the story" of the felony (*ibid.*). A "convicted felon" is one "convicted . . . , or found not guilty by reason of insanity" (*id.*, subd. (a)(1)) of a felony, as defined by "any California or United States statute" (*id.*, subd. (a)(2)), which was committed in California (*id.*, subd. (a)(1)). "Story" means "a depiction, portrayal, or reenactment of a felony" but "shall not be taken to mean a passing mention of the felony, as in a footnote or bibliography." (*Id.*, subd. (a)(7).) A "beneficiary" is one who has a legal claim against the convicted felon, including a survivorship or wrongful death claim, for physical, mental, or emotional injury, or pecuniary loss, caused by the felony. (*Id.*, subd. (a)(4).)

The trust continues for five years from the conviction, or from the payment of any covered proceeds to the felon, whichever is later. (§ 2225(b)(1).) The felon's unpaid obligations for restitution, restitution and penalty fines, and crime-related attorney fees have first priority against the trust. (*Id.*, subd. (d).) Within the five-year trust period, beneficiaries may bring actions to recover their respective interests in the remaining funds (*id.*, subd. (c)(1),(2)), and the filing of such an action extends the trust period until such actions are concluded (*id.*, subd. (b)(1)). Each beneficiary's interest is an equitable share, given the funds available, of his or her recoverable damages from the crime, less any compensation already received from the felon or from the Restitution Fund (*id.*, subds. (a)(5), (d)). Payment to the beneficiary may be ordered from proceeds already received by the felon and, as necessary, from proceeds to be received in the future. (*Id.*, subd. (c)(3).)

Within one year after the conviction or the felon's receipt of covered proceeds, whichever is later (§ 2225, subd. (e)(2)), the Attorney General may also bring an

action to impose an "express trust" on covered proceeds, thus requiring their placement in a bank depositary (*id.*, subd. (e)(1); see also *id.*, subd. (e)(3)), if he proves it is "more probable than not" that there are beneficiaries entitled to compensation for the felony (*id.*, subd. (e)(3)). Either a beneficiary or the Attorney General may, in appropriate circumstances, obtain a preliminary injunction to prevent waste of proceeds subject to the involuntary trust. (*Id.*, subd. (f)(1), (2).)

Funds subject to the trust, but not claimed by a beneficiary at the end of the trust period, do not revert to the felon's ownership. Instead, they must be transferred to the Controller for allocation to the Restitution Fund. (§ 2225(b)(1); see also *id.*, subd. (e)(3).)

As indicated above, the United States Supreme Court struck down a similar New York law in *Simon & Schuster*, *supra*, 502 U.S. 105. We conclude the analysis of *Simon & Schuster* governs this case and renders section 2225(b)(1) invalid as well. Both the New York and California laws impose content-based financial penalties on protected speech. Thus they must, at a minimum, satisfy strict constitutional scrutiny. Both laws seek to serve compelling interests in preventing criminals from exploiting their crimes for profit, and in compensating crime victims from the profits of crime. Yet both laws are *overinclusive* for those purposes, because they confiscate all income from all expressive materials, whatever their general themes or subjects, that include significant discussions of their creators' past crimes.

Our reasoning requires, of course, a detailed examination of *Simon & Schuster*. The New York statute there at issue provided that if any person "accused or convicted of a

crime in this state" was due money under contract with respect to a "reenactment" of the crime "'by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, [or] live entertainment of any kind,'" or for expressions of the person's thoughts or feelings about the crime, the contract must be reported to the New York State Crime Victims Board (New York Board), and the money due must be paid over to the New York Board to be placed in an escrow account, primarily for the benefit of victims who, within five years thereafter, won money judgments against the criminal. (*Simon & Schuster, supra*, 502 U.S. 105, 109 [112 S.Ct. 501, 504-505]; see N.Y. Exec. Law § 632-a(1), (4) (McKinney 1982 & 1991 supp.).) The statute defined "convicted" persons to include those who had "voluntarily and intelligently admitted" crimes for which they were not prosecuted. (*Simon & Schuster, supra*, at p. 110 [112 S.Ct. at p. 505], italics omitted; N.Y. Exec. Law § 632-a(10)(b).)[11]

While the law was in effect, Simon & Schuster, Inc., contracted to finance and publish a book by Henry Hill, a former gangster turned government witness. The book would tell the story of Hill's organized crime career. After

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[11] The New York law, like section 2225(b)(1), established priorities of claims against the account, including the criminal's valid claim for expenses of legal representation. (*Simon & Schuster, supra*, 502 U.S. 105, 110 [112 S.Ct. 501, 505]; see N.Y. Exec. Law § 632-a(7), (8), (11).) Unlike section 2225(b)(1), the New York law allowed general creditors of the criminal to reach the impounded funds (*Simon & Schuster, supra*, at p. 110 [112 S.Ct. at p. 505]; see N.Y. Exec. Law § 632-a(11)(c)), but provided that if no claims against the account were pending at the end of the five-year period, remaining funds in the account would be repaid to the criminal (*Simon & Schuster, supra*, at p. 109 [112 S.Ct. at pp. 504-505]; see N.Y. Exec. Law § 632-a(4)).

considerable investment of time and effort by Hill and his coauthor, the book, Wiseguy, was published in 1986. Its colorful account of Hill's many criminal exploits, and of life inside the Mafia, met with commercial and critical success.

When the New York Board learned of Wiseguy's publication, it invoked the Son of Sam law. After reviewing the book, and Simon & Schuster's contract with Hill, the New York Board determined that all monies paid or owed to Hill under the contract were subject to the statute's escrow provisions. Simon & Schuster was ordered to pay the New York Board all future sums due to Hill, and Hill was ordered to pay the New York Board all sums already remitted to him. Simon & Schuster filed a federal suit, seeking a declaration, under 42 United States Code section 1983, that the New York law was facially invalid under the First Amendment. The federal district court granted the New York Board's motion for summary judgment, and a divided court of appeals affirmed. (*Simon & Schuster, supra,* 502 U.S. 105, 115 [112 S.Ct. 501, 507-508].)

The United States Supreme Court unanimously concluded that the judgment of the court of appeals must be reversed.[12] Six justices, in an opinion authored by Justice O'Connor, first noted that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *Leathers v. Medlock*, 499 U. S. 439, 447 [111 S.Ct. 1438, 1443-1444, 113 L.Ed.2d 494] (1991). . . . [¶]

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[12] Justice Thomas did not participate.

. . . In the context of financial regulation, it bears repeating, as we did in *Leathers*, that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. 499 U. S., at 448-449 [111 S.Ct. at pp. 1444-1445]. The First Amendment presumptively places this sort of discrimination beyond the power of the government." (*Simon & Schuster*, *supra*, 502 U.S. 105, 115-116 [112 S.Ct. 501, 508].)

New York's Son of Sam law was a presumptively invalid content-based burden on speech, said the majority, because "[i]t singles out income derived from expressive activity for a burden the State places on no other income, . . . is directed only at works with a specified content," and "plainly imposes a financial disincentive only on speech of a particular content." (*Simon & Schuster*, *supra*, 502 U.S. 105, 116 [112 S.Ct. 501, 508].) Because the statute penalized speech on the basis of its content, the majority concluded, the law must survive "strict" constitutional scrutiny, i.e., "'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' [Citation.]" (*Id.*, at p. 118 [112 S.Ct. at p. 509].)

The majority emphasized that the state had no compelling interest in shielding readers and victims from negative emotional responses to a criminal's public retelling of his misdeeds. Indeed, the majority observed, the protection of offensive and disagreeable ideas is at the core of the First Amendment. (*Simon & Schuster*, *supra*, 502 U.S. 105, 118 [112 S.Ct. 501, 509-510].) On the other hand, the majority agreed, states do have compelling interests in "ensuring that victims of crime are compensated by those who harm them" (*ibid.*), "preventing

wrongdoers from dissipating their assets before victims can recover" (*ibid.*), "ensuring that criminals do not profit from their crimes" (*id.*, at p. 119 [112 S.Ct. at p. 510]), and transferring the fruits of crime from the criminals to their victims (*id.*, at pp. 119-120 [112 S.Ct. at pp. 510-511]). Moreover, the majority concluded it could "assume without deciding" that royalties from a criminal's book about his crimes, the form of income at issue in the case before it, "represent[] the fruits of crime." (*Id.*, at p. 119 [112 S.Ct. at p. 510].)

Of course, the majority observed, New York could not defend its statute by narrowly defining the interest at stake in terms of the actual operation of its law. New York claimed a compelling interest in preventing criminals from retaining the profits of *storytelling* about their crimes before their victims were compensated. However, the majority noted, the state could not show why it had a greater interest in compensating crime victims from the profits of such storytelling than from the criminal's other assets. "Nor [could the state] justif[y] . . . a distinction between this expressive activity and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims." (*Simon & Schuster*, 502 U.S. 105, 119-120 [112 S.Ct. 501, 510].) "In short," the majority concluded, "the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime." (*Id.*, at pp. 120-121 [112 S.Ct. at p. 511].)

Accordingly, the majority reasoned, it must examine whether New York's statute was "narrowly tailored to advance the former, not the latter, objective." (*Simon & Schuster, supra*, 502 U.S. 105, 121 [112 S.Ct. 501, 511].)

The New York statute was not so tailored, the majority determined, for "[a]s a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly *overinclusive*." (*Ibid.*, italics added.) In the majority's view, two factors in particular illustrated the statute's overbreadth. First, "the statute applies to works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally. [Citation.]" (*Ibid.*, italics in original.) Second, "the statute's broad definition of 'person convicted of a crime' enables the Board to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted. [Citation.]" (*Ibid.*)

"These two provisions," said the majority, "combine to encompass a potentially very large number of works. Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as The Autobiography of Malcolm X, which describes crimes committed by the civil rights leader before he became a public figure; Civil Disobedience, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the Confessions of Saint Augustine, in which the author laments 'my past foulness and the carnal corruptions of my soul,' one instance of which involved the theft of pears from a neighboring [orchard]. [Citations.] *Amicus* Association of American Publishers, Inc., has submitted a sobering bibliography listing hundreds of works by American prisoners and ex-prisoners, many of which contain descriptions of the crimes for which the authors were incarcerated, including works by such authors as Emma Goldman and Martin Luther King, Jr. A list of prominent figures whose

autobiographies would be subject to the statute if written is not difficult to construct: The list could include Sir Walter Raleigh, who was convicted of treason after a dubiously conducted 1603 trial; Jesse Jackson, who was arrested in 1963 for trespass and resisting arrest after attempting to be served at a lunch counter in North Carolina; and Bertrand Russell, who was jailed for seven days at the age of 89 for participating in a sit-down protest against nuclear weapons. The argument that a statute like the Son of Sam law would prevent publication of *all* of these works is hyperbole – some would have been written without compensation – but the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated." (*Simon & Schuster*, *supra*, 502 U.S. 105, 121-122 [112 S.Ct. 501, 511], fn. omitted, italics in original.)

In sum, said the majority, New York's Son of Sam law "has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment." (*Simon & Schuster*, *supra*, 502 U.S. 105, 123 [112 S.Ct. 501, 512].)

In separate opinions, Justices Blackmun and Kennedy concurred in the judgment. Justice Blackmun opined that the New York law was underinclusive as well as overinclusive, and "we should say so." (*Simon & Schuster*, *supra*, 502 U.S. 105, 123-124 [112 S.Ct. 501, 512-513] (conc. opn. of Blackmun, J.).) Justice Kennedy suggested that a statute is unconstitutional per se if it regulates the specific

content of speech which is neither defamatory, nor tantamount to a criminal act, nor an impairment of some other constitutional right, nor an incitement to lawless action, nor calculated to bring about an imminent harm the state has the substantive power to prevent. A statute that regulates the content of speech beyond these narrow limits, said Justice Kennedy, cannot be saved by finding that it is narrowly tailored to serve a compelling state interest. (*Id.*, at pp. 124-128 [112 S.Ct. at pp. 512-514] (conc. opn. of Kennedy, J.).)[13]

In his efforts to distinguish section 2225(b)(1), Sinatra, Jr., first makes a cursory argument that California's statute, unlike New York's, is not a presumptively invalid content-based regulation of speech. The effort must fail. Section 2225(b)(1), like the New York statute at issue in *Simon & Schuster*, places a direct financial disincentive on speech or expression about a particular subject. The California statute explicitly targets and confiscates a convicted felon's proceeds from books, films, articles, recordings, broadcasts, interviews, or performances that include the story of the felon's crime. While certain classes of speech – obscenity, fighting words, some defamation – may be subject to viewpoint-neutral regulation because of their directly injurious nature (see, e.g., *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 382-390 [112 S.Ct. 2538, 3542-3547,

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[13] One jurisdiction's Son of Sam law has been invalidated since *Simon & Schuster*. (*Bouchard v. Price* (R.I. 1997) 694 A.2d 670, 675-678.) The laws in two other states have been challenged, but the appeals in those matters were decided on grounds other than the constitutionality of the statutes at issue. (See *Rolling v. State ex rel. Butterworth* (Fla.Dist.Ct.App. 1994) 630 So.2d 635; *Curran v. Price* (1994) 334 Md. 149 [638 A.2d 93].)

120 L.Ed.2d 305]; *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 571-572 [62 S.Ct. 766, 768-769, 86 L.Ed. 1031]), discussions of crime have never been included in this limited category.[14]

Sinatra, Jr., asserts that laws imposing financial penalties on speech do not necessarily violate the First Amendment. He cites cases for the principle that the government need not subsidize the exercise of free speech or other constitutional rights. (E.g., *Lyng v. Automobile Workers* (1988) 485 U.S. 360 [108 S.Ct. 1184, 99 L.Ed.2d

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[14] Concluding that the New York's Son of Sam law was a content-based regulation of speech, the *Simon & Schuster* majority noted, in a brief passage, that the law "singles out income derived from expressive activity for a burden the State places on no other income." (*Simon & Schuster, supra*, 502 U.S. 105, 116 [112 S.Ct. 501, 508.) As noted above, California's Son of Sam law has a feature New York's did not; besides confiscating a convicted felon's income from telling his crime story, the California statute, by amendments adopted after *Simon & Schuster*, also confiscates profits earned by a convicted felon, or a profiteer, from the sale of memorabilia, property, things, or rights for a value enhanced by their felony-related *notoriety value*. (§ 2225(b)(2).) Thus, it cannot be said that California's law, read as a whole, burdens income from speech as distinct from *all other crime-related income*. The Attorney General urges that this distinction between the California and New York statutes means the California law is not a content-based regulation of speech. We disagree. California's effort to reach the fruits of crime beyond those derived from storytelling about the crime might bear on whether our statute is unconstitutionally *underinclusive*, an issue we need not and do not decide. However, we do not read this brief language of *Simon & Schuster* to mean that a statute can escape examination as a content-based regulation of speech merely by targeting, in separate provisions, nonspeech income as well. There can be no doubt that section 2225(b)(1) itself meets the definition of a content-based speech regulation; it focuses directly and solely on income from speech and "is directed only at works with a specified content." (*Simon & Schuster, supra*, 502 U.S. 105, 116 [112 S.Ct. 501, 508].)

380] [denial of food stamps to household with striking worker]; *Regan v. Taxation With Representation of Wash.* (1983) 461 U.S. 540 [103 S.Ct. 1997, 76 L.Ed.2d 129] [denial of tax exemption to organizations engaged in lobbying]; *Harris v. McRae* (1980) 448 U.S. 297 [100 S.Ct. 2671, 65 L.Ed.2d 784] [denial of federal funds to reimburse abortions].) But he fails to show how section 2225(b)(1), by confiscating income from speech based on its content, departs from the presumptively unconstitutional form of statute at issue in *Simon & Schuster*.

Nor does it matter that New York's law focused on *media entities*' contracts for crime stories, while section 2225(b)(1) targets crime story proceeds in the hands of the criminal himself. As *Simon & Schuster* noted with respect to the facts in that case: "Whether the First Amendment 'speaker' is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content." (*Simon & Schuster*, *supra*, 502 U.S. 105, 116 [112 S.Ct. 501, 508].) "The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker" (*Simon & Schuster, supra,* at p. 117 [112 S.Ct. at p. 509]), and section 2225(b)(1), like the New York statute, "establishes a financial disincentive to *create or publish* works

with a particular content" (*Simon & Schuster, supra,* at p. 118 [112 S.Ct. at p. 509], italics added).[15]

Section 2225(b)(1) is thus a suspect content-based regulation of speech. As such, the section is unconstitutional unless, at a minimum, it is narrowly tailored to serve compelling state interests. (*Simon & Schuster, supra,* 502 U.S. 105, 118 [112 S.Ct. 501, 509-510]; *Sable Communications of Cal., Inc. v. FCC* (1989) 492 U.S. 115, 126 [109 S.Ct. 2829, 2836-2837, 106 L.Ed.2d 93].) In applying this standard, we must first determine what, if any, such compelling interests section 2225(b)(1) seeks to serve.

By its terms, section 2225(b)(1) confiscates, for the benefit of uncompensated victims of crime, sums due or owing to a convicted felon from expressive materials that include the story of the felony. It thus appears the purpose

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[15] By denying compensation for an expressive work, a law may chill not only the free speech rights of the author or creator, but also the reciprocal First Amendment right of the work's audience to *receive* protected communications. (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 756 [96 S.Ct. 1817, 1822-1823, 48 L.Ed.2d 346]; see *Pacific Gas & Elec. Co. v. Public Util. Comm'n* (1986) 475 U.S. 1, 8 [106 S.Ct. 903, 907-908, 89 L.Ed.2d 1] (plur. opn. of Powell, J.).) The chilling effect of financial disincentives was recognized again in *United States v. Treasury Employees* (1995) 513 U.S. 454, 468-470 [115 S.Ct. 1003, 1014-1015, 130 L.Ed.2d 964], where the court struck down a congressional ban on the receipt by certain high-level government employees of honoraria for speeches. (See also *Va. Pharmacy Bd., supra,* 425 U.S. at pp. 756-757 [96 S.Ct. at pp. 1822-1823]; *Mine Workers v. Illinois Bar Assn.* (1967) 389 U.S. 217, 222 [88 S.Ct. 353, 356, 19 L.Ed.2d 426]; *Mazer v. Stein* (1954) 347 U.S. 201, 219 [74 S.Ct. 460, 471-472, 98 L.Ed. 630].)

of section 2225(b)(1) is to assure that the "fruits" of one's crimes – in this case, proceeds from exploiting the story of those crimes – will be used to compensate crime victims.

Statements of legislative intent confirm this inference. When the predecessor of section 2225(b)(1) was adopted in 1983, the Legislature declared, as justification for the law, that "[v]ictims of felonies have a special relationship to proceeds from the sale of stories about those felonies which are written by persons convicted of committing them." (Stats. 1983, ch. 1016, § 1, p. 3581.) It further recited that the new law "amplifies [and] supplements [Civil Code] sections 2224 [making one an involuntary trustee, for the benefit of the true owner, of any thing gained by fraud, accident, mistake, undue influence, violation of trust, or other wrongful act] and 3517 [confirming the duty to compensate for injury or damage caused by one's legal wrong]." (*Id.*, § 3, p. 3584.) In connection with more recent amendments to section 2225, the Legislature asserted, in a paraphrase from *Simon & Schuster*, that "[t]he state has a compelling interest in ensuring that convicted felons do not profit from their crimes and that the victims of crime are compensated by those who harm them." (Stats. 2000, ch. 261, § 1, subd. (b)).

Though there is no compelling interest in targeting a criminal's storytelling proceeds *in particular* for the purpose of compensating crime victims (*Simon & Schuster*, *supra*, 502 U.S. 105, 119-120 [112 S.Ct. 501, 510-511]), the state does have a compelling interest in using the fruits of crime *generally* for that purpose. (*Id.*, at pp. 118-121 [112 S.Ct. at pp. 509-511].) We may assume, in this regard, that the fruits of crime include a criminal's proceeds from exploiting the story of the crime. (*Id.*, at p. 119 [112 S.Ct.

at p. 510].) The question thus arises whether section 2225(b)(1), within its sphere of operation, is narrowly tailored to ensure that the fruits of crime are used to compensate the victims of crime.

Of course, to be narrowly tailored does not require "that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests' [citation]." (*Board of Trustees, State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 478 [109 S.Ct. 3028, 3034, 106 L.Ed.2d 388].) We examine whether section 2225(b)(1) meets this test.[16]

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[16] Though it elsewhere clearly concluded that New York's Son of Sam law was a *content-based* regulation of speech which must be narrowly tailored to serve a *compelling* state interest, the *Simon & Schuster* majority also noted that "[b]ecause the [New York] law is so overinclusive," there was no need to address the New York Board's claim that the statute was *content neutral* under the test set forth in such cases as *Ward v. Rock Against Racism* (1989) 491 U.S. 781 [109 S.Ct. 2746, 105 L.Ed.2d 661] and *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41 [106 S.Ct. 925, 89 L.Ed.2d 29]. (*Simon & Schuster*, *supra*, 502 U.S. 105, 122 [112 S.Ct. 501, 511-512], asterisked fn.) As *Simon & Schuster* majority explained, *Ward* and *Renton* fall within a line of authority suggesting that regulations are content neutral, despite their incidental effect on some but not all speakers, if they are justified by concerns unrelated to the content of speech. (*Ward*, *supra*, at p. 791 [109 S.Ct. at pp. 2753-2754] [antinoise regulation requiring city sound equipment and city sound technician for outdoor concert, as applied to antiracism organization]; *Renton*, *supra*, at p. 48 [106 S.Ct. at p. 929] [zoning regulation of adult theaters].) The *Simon & Schuster* majority indicated that although a content-neutral regulation of expression need not serve a *compelling* state interest, it must nonetheless be "narrowly tailored" to serve whatever nonspeech interest the state asserts. (*Simon & Schuster*, *supra*, at p. 122, fn.* [112 S.Ct. at pp. 511-512].) The majority concluded that even if New York's Son of Sam law was analyzed as content neutral rather than content based, it was

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Keenan urges that section 2225(b)(1) is *underinclusive*, because it confiscates profits from expressive activity, i.e., storytelling about one's crimes, while leaving undisturbed other gains and profits the criminal might realize from the crimes or their exploitation. Portions of the majority's discussion in *Simon & Schuster, supra,* 502 U.S. 105, imply such a flaw in the New York statute there at issue. At several points, the majority stressed that the statute singled out a criminal's profits from expressive activity to the exclusion of all other crime-related profits, and suggested that the state could demonstrate no compelling interest in such a distinction when fashioning a law to compensate crime victims from the fruits of crime. (*Id.*, at pp. 116, 119-121, 123 [112 S.Ct. at pp. 508, 510-511, 512].) Justice Blackmun suggested this was tantamount to a conclusion that the New York statute was underinclusive. (*Id.*, at pp. 123-124 [112 S.Ct. at pp. 512-513] (conc. opn. of Blackmun, J.).)

However, having determined that the New York law was overinclusive, the high court expressly stated it need not decide whether the law was underinclusive as well. (*Simon & Schuster*, *supra*, 502 U.S. 105, 122, fn.* [112 S.Ct. 501, 511-512].) Noting that Keenan's attack on the California statute was focused primarily on *Simon & Schuster*, the instant Court of Appeal similarly refused to address the issue of underinclusiveness. Because we hereafter conclude that California's law, like New York's, is overinclusive in any event, we pursue a similar course.

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still "too overinclusive" to meet this test. (*Ibid.*) For reasons explained below, we reach a similar conclusion with respect to section 2225(b)(1).

Indeed, any conclusion that the New York statute was underinclusive might not apply to California's law. As noted above, the California statute, unlike New York's, *does* confiscate at least one additional category of a criminal's crime-related profits, those derived from sales of memorabilia, property, things, or rights for a value enhanced by their crime-related notoriety value. (§ 2225(b)(2).) In the posture of this case, and lacking further development of the issue by the parties in their briefs, we need not and do not decide whether the California statute, which includes but reaches beyond speech-related profits, is underinclusive.

We are persuaded, however, that section 2225(b)(1), like the New York law at issue in *Simon & Schuster*, is overinclusive and therefore invalid. As did the New York statute, section 2225(b)(1) penalizes the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. Even if the fruits of crime may include royalties from exploiting the story of one's crimes, section 2225(b)(1) does not confine itself to such income. Instead, it confiscates *all* a convicted felon's proceeds from speech or expression on *any* theme or subject which includes the story of the felony, except by mere passing mention. By this financial disincentive, section 2225(b)(1), like its New York counterpart, discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds.

In at least one respect, the involuntary trust provision of section 2225(b)(1) operates more harshly against expressive materials that depict the creator's past crimes than did the escrow account provided for by the New York

law at issue in *Simon & Schuster*. Under the New York statute, proceeds from a crime story contract were to be turned over to the New York Board for placement in escrow, but if, at the end of five years, no valid claims of the criminal's victims or creditors were pending, remaining funds in the account were returned to the criminal. (*Simon & Schuster*, *supra*, 502 U.S. 105, 109 [112 S.Ct. 501, 504-505]; see N.Y. Exec. Law § 632-a(4).) Under section 2225(b)(1), by contrast, any entrusted amounts not subject to legitimate individual claims at the end of the five-year trust period are turned over to the Controller for allocation to the Restitution Fund.[17]

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[17] The ACLU suggests that, for this reason alone, the statute is an impermissibly overbroad deterrent to creative expression for compensation, since it forces a convicted felon to give up speech-related income for the benefit of *crime victims generally*, even after his own victims have been compensated. Section 2225(b)(1) does appear to impose an involuntary trust on the convicted felon's proceeds from materials that include the story of the crime, and to confiscate such proceeds after five years for the benefit of crime victims generally, even if there *never were* "beneficiaries" with specific claims against the felon. In order to impose an "express trust" in a bank depositary, the Attorney General must show it is "more probable than not" that beneficiaries exist (*id.*, subd. (e)(3)), and only a beneficiary or the Attorney General may obtain a preliminary injunction to prevent waste or dissipation of entrusted funds (*id.*, subd. (f)(1)). However, the trust character of the proceeds in the felon's hands, and their ultimate forfeiture to the state's Restitution Fund, do not appear to depend on the actual existence of uncompensated victims of the felon's crime.

The Attorney General responds that the state has a compelling interest in using the fruits of a particular crime not only to compensate that crime's direct victims, but also as a source of criminal restitution generally. As we conclude elsewhere in this opinion, section 2225(b)(1) is overbroad in any event, because it confiscates speech-related income on the basis of its content, and thus discourages such protected speech, far beyond the degree necessary to reach the fruits of crime.

Sinatra, Jr., nonetheless urges that two features of section 2225(b)(1) cure the overinclusiveness problem identified in *Simon & Schuster*. First, he notes, section 2225(b)(1), unlike New York's law, applies only to persons *actually found guilty* of *felonies* committed in this state. (§ 2225, subd. (a)(1), (2).) Thus, Sinatra, Jr., points out, California's statute, unlike New York's, presents no danger that an innocent person will be penalized, or that income from an expressive work will be confiscated simply for inclusion of a past offense that was minor, or for which the work's creator was never prosecuted. Second, Sinatra, Jr., observes, section 2225(b)(1) applies only to expressive materials that include the "story" of a felony for which one was convicted, and exempts mere "passing mention of the felony, as in a footnote or bibliography." (*Id.*, subd. (a)(7).) These restrictions, Sinatra, Jr., insists, negate *Simon & Schuster*'s concern, with respect to the New York statute, that all profits from an expressive work would be confiscated though the work mentioned a past offense only "tangentially or incidentally." (*Simon & Schuster*, *supra*, 502 U.S. 105, 121 [112 S.Ct. 501, 511].)

We are not persuaded. In *Simon & Schuster*, the Supreme Court *illustrated* the overbroad sweep of the New York statute by showing that it encompassed even minor, unprosecuted offenses or mere "tangential[ ] or incidental [ ]" mention of past crimes in a larger context. (*Simon & Schuster, supra,* 502 U.S. 105, 121 [112 S.Ct. 501, 511].) But we do not read *Simon & Schuster* as suggesting that a statute which exhibited marginal narrowing in these particular regards would necessarily pass constitutional muster.

Instead, the court's concern was with the essential values of the First Amendment. As the court's lengthy

discussion discloses, the vice of the New York law was that in order to serve a relatively narrow interest – compensating crime victims from the fruits of crime – the statute targeted, segregated, and confiscated *all* income from, and thus unduly discouraged, a wide range of expressive works containing protected speech on themes and subjects of legitimate interest, simply because material of a certain content – reference to one's past crimes – was included.

Thus, the California statute's limitation to *felony convictions* does not suffice to avoid an overbroad infringement of speech. As *Simon & Schuster* made clear, one motivated in part by compensation might discuss his or her past crimes, including those that led to felony convictions, in many contexts not directly connected to exploitation of the crime. One might mention past felonies as relevant to personal redemption; warn from experience of the consequences of crime; critically evaluate one's encounter with the criminal justice system; document scandal and corruption in government and business;[18] describe the conditions of prison life; or provide an inside look at the criminal underworld.

Mention of one's past felonies in these contexts may have little or nothing to do with exploiting one's crime for profit, and thus with the state's interest in compensating crime victims from the fruits of crime. Yet section 2225(b)(1) entrusts and permanently confiscates all income, whenever received, from all expressive materials,

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[18] As the Association of American Publishers, Inc., points out, discussion of governmental affairs is at the core of the First Amendment. (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1034-1035 [111 S.Ct. 2720, 2723-2725, 115 L.Ed.2d 888].)

whatever their subject, theme, or commercial appeal, that include a substantial description of such offenses, whatever their nature and however long in the past they were committed.[19] Thus, even as so limited to felony convictions, section 2225(b)(1) is not narrowly tailored to achieve the compelling interests it purports to serve.

As indicated above, the *Simon & Schuster* majority also found overbreadth in the New York statute because it confiscated profits from expressive works that "express[ed] the author's thoughts or recollections about his crime, *however tangentially or incidentally*." (*Simon & Schuster*, *supra*, 502 U.S. 105, 121 [112 S.Ct. 501, 511], italics added.) Sinatra, Jr., urges that the California statute avoids this defect because it applies only to expressive materials containing the "story" of the felony – i.e., a "depiction, portrayal, or reenactment" of the criminal episode (§ 2225, subd. (a)(7)), and because it expressly exempts mere "passing mention of the felony, as in a footnote or bibliography" (*ibid.*). Thus, Sinatra, Jr., suggests, the California statute applies only when an expressive work provides *narrative detail* about a felony for which the work's author or creator was convicted, and

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[19] As indicated above, section 2225(b)(1) imposes an involuntary trust upon all "proceeds . . . received by or owing to" a convicted felon for expressive materials that include the story of the crime (*id.*, subd. (a)(9). The statute imposes no limit on the time that may elapse between the crime and receipt of the proceeds. The trust period begins when proceeds are received or due, then continues, as extended pending the completion of suits by beneficiaries, for five years after the conviction, or five years after the payment of proceeds to the felon, "whichever is later." (§ 2225(b)(1).)

does not discourage mere *acknowledgement* of a prior felony conviction in the context of another subject.

The Attorney General echoes this view, suggesting that a "story," as defined by the section 2225, subdivision (a)(7), is a "vivid" depiction, portrayal, or reenactment. Further, the Attorney General suggests, the exemption is for "passing mention . . . , *as in* a footnote or bibliography" (*ibid.*, italics added), demonstrating that the example given is illustrative only, and that other forms of "passing mention" are also exempt.

These arguments do not convince us that section 2225(b)(1) focuses with sufficient precision on the fruits of crime, while leaving other speech-related income undisturbed. *Simon & Schuster* illustrated the overbreadth of the New York statute by observing that it reached even incidental and tangential mention of past crimes, but nothing in *Simon & Schuster* suggests the New York law could have cured its overinclusive effect simply by providing an exemption for tangential or incidental references. Moreover, *Simon & Schuster* neither stated nor implied that the federal Constitution might allow confiscation, on behalf of crime victims, of all proceeds from any expressive work that includes a descriptive account, or even a vivid account, of a past crime committed by the author.

Such arbitrary demarcation lines do not comport with the basic rationale of *Simon & Schuster*. A statute that confiscates all profits from works which make more than a passing, nondescriptive reference to the creator's past crimes still sweeps within its ambit a wide range of protected speech, discourages the discussion of crime in nonexploitative contexts, and does so by means not

narrowly focused on recouping profits from the *fruits of crime*.

Indeed, Keenan, joined by his amici curiae, urges that the "passing mention" exemption is so *imprecise* and *unclear* that it constitutes an impermissibly vague basis for the censorship of protected speech. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 109 [92 S.Ct. 2294, 2299, 33 L.Ed.2d 222]; see also *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 874 [117 S.Ct. 2329, 2345-2346, 138 L.Ed.2d 874].) We need not resolve the vagueness issue, because we are persuaded that, by any reasonable interpretation, the statute remains overinclusive. Certainly the statutory definition of "story" includes any *substantial* account of the facts and circumstances of a past felony which led to conviction, and the "passing mention" exemption would not provide safe harbor to materials containing such a substantial account. But there are multiple contexts in which expressive materials, with diverse subjects and themes unrelated to the exploitation of one's crimes, might include substantial accounts of those episodes.

Had section 2225(b)(1) been in effect at the time and place of publication, the statute would have applied to numerous works by authors whose discussions of larger subjects make substantial, and often vividly descriptive, contextual reference to prior felonies of which they were convicted.[20] A statute which operates in this fashion

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[20] These include, for example, Alex Haley and Malcolm X's The Autobiography of Malcolm X (Ballantine Books ed. 1992), in which the murdered civil rights leader describes early burglaries for which he was convicted (*id.*, at pp. 161-172); Eldridge Cleaver's Soul on Ice (1968), which discusses his rapes of White women, for which he was

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disturbs or discourages protected speech to a degree substantially beyond that necessary to serve the state's compelling interest in compensating crime victims from the fruits of crime. Accordingly, we conclude, in conformity with *Simon & Schuster*, that section 2225(b)(1) is facially invalid under the First Amendment to the United States Constitution.

We reach a similar result under the liberty of speech clause of the California Constitution (art. I, § 2, subd. (a)).[21] The California provision provides similar, and

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incarcerated, as since-repented acts of racial rage (*id.*, at pp. 14-15); memoirs by Charles Colson (Born Again (1976)), G. Gordon Liddy (Will! (1980)), and John Dean (Blind Ambition: The White House Years (1976)) detailing their criminal roles in the Watergate coverup; and the memoirs of Patricia Hearst, the scion of a publishing dynasty, who was kidnapped by the Symbionese Liberation Army and later participated with her captors in an armed bank robbery for which she was imprisoned (Hearst & Moscow, Every Secret Thing (1981)).

[21] We stress the narrow nature of our holding under both the federal and California Constitutions. We conclude only that section 2225(b)(1) is an overinclusive infringement of protected speech because it targets and confiscates *all* a convicted felon's proceeds from expressive materials that include any *substantial account* of the felony, in whatever context. We express no views on whether a statute targeting the income gained from expressive works that include accounts of the author's crimes could be drafted narrowly and precisely enough to overcome this problem of constitutional overbreadth. Moreover, nothing we say here precludes a crime victim, as a judgment creditor, from reaching a convicted felon's assets, including those derived from expressive materials that describe the crime, by generally applicable remedies for the enforcement and satisfaction of judgments. (See generally Code Civ. Proc., §§ 481.010 et seq., 680.010 et seq.) Nor do we intend, by our analysis in this case, to preclude further legislative steps, not directly related to the content of speech, to ensure that a convicted felon's income and assets, including those derived from storytelling about the crimes, are and remain available to compensate persons injured or damaged by the felon's crimes.

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sometimes greater, protection of speech than the First Amendment (e.g., *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366-367 & fn. 12 [93 Cal.Rptr.2d 1, 993 P.2d 334]), and neither party suggests any reason why it should provide lesser protection under the circumstances of this case.[22]

Finally, because we conclude that section 2225(b)(1) is overbroad for its legitimate purpose, we need not and do not address Keenan's contention, derived from Justice Kennedy's concurring opinion in *Simon & Schuster*, that a content-based regulation of speech is unconstitutional per se, and can never be justified by an interest of the state.

[22] The Attorney General argues that even if section 2225(b)(1), confiscating proceeds from expressive materials that include a felon's story of the crime, is invalid, we should affirmatively uphold section 2225(b)(2), which confiscates profits from memorabilia, property, things, or rights sold for values enhanced by their felony-related notoriety. The Attorney General represents that he has pending a case, *Lockyer v. Brown, aka "X-Raided"* (Super. Ct. Sacramento County, 1999, No. 99AS02640) seeking to confiscate, under section 2225(b)(2), "profits" from a compact disc entitled *Unforgiven*, which features defendant Brown, a rap artist and convicted murderer. At the Attorney General's request, we have taken judicial notice of the complaint in the Sacramento action.

However, as indicated above, neither the parties nor the Court of Appeal have focused on the "notoriety value" provisions of section 2225(b)(2), which is clearly severable, but have debated only whether section 2225(b)(1), dealing with *storytelling* about the crime, is constitutional. At oral argument, Sinatra, Jr.'s, counsel acknowledged that, despite its brief prayer for statutory "profits" (§ 2225, subds. (a)(10), (b)(2)) as well as "proceeds" (*id.*, subds. (a)(9), (b)(1)), Sinatra, Jr.'s, complaint is premised solely on section 2225(b)(1), the storytelling provision. Counsel for both parties agreed that the applicability and validity of section 2225(b)(2) are not before us except as raised, for the first time in this court, by the Attorney General as amicus curiae. Under the circumstances, we decline the Attorney General's invitation to opine upon the constitutionality of section 2225(b)(2), and we leave that issue for a case presenting it more directly.

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Conclusion

The trial court overruled Keenan's demurrer to Sinatra, Jr.'s, complaint, reasoning that the storytelling provision of California's statute (§ 2225(b)(1)), on which the complaint is solely based (see fn. 22, *ante*), is not unconstitutional. The Court of Appeal affirmed on similar grounds. Because we have concluded, contrary to both lower courts, that section 2225(b)(1) is invalid, we must reverse the judgment of the Court of Appeal.

The judgment of the Court of Appeal is reversed, and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

George, C. J., Kennard, J., Werdegar, J., Chin, J., and Moreno, J., concurred.

Similarly, because we conclude that the challenged provisions are invalid infringements on speech, we need not and do not address Keenan's argument, raised at all stages, that application to him of section 2225, which was enacted long after the kidnapping of Sinatra, Jr., violates federal and state constitutional prohibitions of ex post facto legislation.

BROWN, J., Concurring.

The majority correctly observes Civil Code section 2225, subdivision (b)(1),[1] shares the essential constitutional flaws condemned in *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.* (1991) 502 U.S. 105 [112 S.Ct. 501, 116 L.Ed.2d 476] (*Simon & Schuster*). Lest it seem the moral of the story is crime *does* pay, I write separately to dispel the understandable misconception that every "Son of Sam" law is unconstitutional. A properly drafted statute can separate criminals from profits derived from their crimes while complying with the First Amendment.

The *Simon & Schuster* court recognized the fundamental difference between works like The Confessions of Saint Augustine or Letter from Birmingham Jail and a ghost-written work entitled Snatching Sinatra. In the former examples, it is the public prominence, fame, wit, passion and eloquence of the authors that make these stories valuable. The "crimes" caused negligible harm to any actual victim and added nothing to the marketability of the stories. In contrast, Mr. Keenan's crime involved both a serious harm and is the source of his work's profitability; judging by the title of his literary effort, it is the celebrity status of his victim that makes the story noteworthy.

Notwithstanding today's decision, the state may constitutionally seize any asset of a criminal to redress the harm inflicted upon his victim. Additionally, the state may seize the fruits of the crime to render it unprofitable. For some works, like The Autobiography of Malcolm X, it may

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[1] All statutory references are to the Civil Code unless otherwise stated.

be difficult to determine the extent to which royalties result from the author's criminal involvement or his literary skill. But the existence of hard cases that might win an as-applied challenge does not mean all such laws are facially unconstitutional. The First Amendment protects schlock journalism as well as great literature. Thus, Mr. Keenan has every right to tell his story. That does not mean the First Amendment guarantees he can keep the money. And therein lies the tale.

In *Simon & Schuster*, *supra*, 502 U.S. at pages 118-119 [112 S.Ct. at pages 509-510], the United States Supreme Court found New York's law could further two compelling state interests, which reflect the notion that crime should neither impoverish the victim nor enrich the criminal. Toward the former imperative, the court recognized the compelling interest in "ensuring that victims of crime are compensated by those who harm them." (*Id.* at p. 118 [112 S.Ct. at p. 509].) Toward the latter end, the court acknowledged the compelling interest in "ensuring that criminals do not profit from their crimes." (*Id.* at p. 119 [112 S.Ct. at p. 510].) The fulfillment of these interests restores both victim and criminal to the status quo ante and nullifies the tangible effects of the crime.

Simon & Schuster invalidated the New York law, however, because it seized speech-generated revenues without necessarily serving either state interest. "Should a prominent figure write his autobiography at the end of his career, and include . . . a brief recollection of having stolen . . . a nearly worthless item . . . the Board would control his entire income. . . . " (*Simon & Schuster*, *supra*, 502 U.S. at p. 123 [112 S.Ct. at p. 512].) Because the book's popularity would be due to the author's lawful prominence rather than his (perhaps previously undiscovered) crime,

the author's income would not be a fruit of the crime, and thus seizure would not serve the antiprofit interest. Since the stolen item was nearly worthless, seizure would not serve the compensation interest. Accordingly, the court found the law "significantly overinclusive." (*Id.* at p. 121 [112 S.Ct. at p. 511].) A properly structured statute could avoid this overinclusivity by seizing only assets that would compensate the victim or render crime unprofitable.

The hypothetically prominent figure who mentions a minor theft in his autobiography bears a strong resemblance to Saint Augustine, and very little to defendant. Defendant's kidnapping created more than trivial harm, and it appears the notoriety of his criminal conduct is substantially responsible for the salability of his literary efforts. Thus, seizure of defendant's royalties serves one or both of the compelling state interests. If so, the state may constitutionally distinguish between Snatching Sinatra and The Confessions of Saint Augustine.

The constitutionality of seizing a criminal's assets to compensate his victims is beyond dispute. As *Simon & Schuster* observed, every state has a body of tort law serving this exact interest. (*Simon & Schuster*, *supra*, 502 U.S. at p. 118 [112 S.Ct. at pp. 509-510].) To effect compensation, it is immaterial whether the funds come from the fruits of crime or the defendant's other assets.

Although compensation may have been a goal of New York's law, it failed to achieve it constitutionally. The law seized only those assets generated by the offender's storytelling. The problem was not the law's underinclusivity per se; after all, a statute need not solve every problem to be constitutional. A law would be underinclusive if it granted the victim only a partial share of the profits or

compensation only up to a maximum sum.[2] These limitations, however, would not create the constitutional defect cited in *Simon & Schuster*: the content-based nature of the speech restriction.

The high court deemed the law presumptively unconstitutional because it imposed a financial burden on speakers due to the content of their speech. (*Simon & Schuster*, *supra*, 502 U.S. at pp. 115-116 [112 S.Ct. at pp. 507-508].) The New York statute "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content." (*Id.* at p. 116 [112 S.Ct. at p. 508].) The dissenting opinion of Judge Newman in the court below demonstrated this content-based discrimination. (*Simon & Schuster, Inc. v. Fischetti* (2d Cir. 1990) 916 F.2d 777, 784 (*Fischetti*) (dis. opn. of Newman, J.).) Judge Newman observed the New York State Crime Victims Board applied the law to the autobiography of Jean Harris, who had killed " 'Scarsdale Diet' Doctor Herman Tarnower" (*Simon & Schuster*, at p. 111 [112 S.Ct. at p. 506]) because the book referred to the homicide in two chapters. (*Fischetti*, at p. 785.) If her book had concerned only the conditions at her prison, her royalties, though enhanced by the notoriety of her crime, would have been

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[2] Indiana law, for example, seizes only 90 percent of income derived from crime. (Ind. Code Ann. § 5-2-6.3-3(a)(1)(B).) According to the logic underlying the Laffer curve (i.e., by suppressing the profit incentive, a 100 percent taxation rate will not yield revenue), a defendant who may retain some profits will be more inclined to write about his crime, thereby generating income with which to compensate the victim. To a significant degree, the compensation and antiprofit imperatives are thus in tension.

protected from seizure. (*Ibid.*) The distinction between the treatment of the actual book and the hypothetical book shows how "[t]he Son of Sam law establishes a financial disincentive to create or publish works with a particular content." (*Simon & Schuster*, at p. 118 [112 S.Ct. at p. 509].)

The content-based discrimination triggered strict scrutiny, whereby the state must show the law is narrowly drawn to further a compelling state interest. (*Simon & Schuster*, *supra*, 502 U.S. at p. 118 [112 S.Ct. at 509-510].) But New York limited the law's reach to "'storytelling'" only; the court found no rational reason "why the State should have any greater interest in compensating victims from the proceeds of such 'storytelling' than from any of the criminal's other assets." (*Id.* at p. 119 [112 S.Ct. at p. 510].) The content-based limitation thus not only created the need to establish a compelling interest, it also rendered the state's interest less than compelling: "the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime." (*Id.* at pp. 120-121 [112 S.Ct. at p. 511].) A law that shields assets such as Ms. Harris's home or stock portfolio from a compensation order hardly serves that interest.

The high court's reasoning shows that a law without this limitation would likely survive review, because the law would not be content based (thus avoiding strict scrutiny) and the law would narrowly serve the compelling interest of victim compensation, and thus, a fortiori, survive a lesser level of scrutiny. The Rhode Island Supreme Court discussed the validity of such a broader law in *Bouchard v. Price* (R.I. 1997) 694 A.2d 670

(*Bouchard*).[3] "Neither plaintiffs nor the Attorney General justified the act's applicability solely to expressive activity. The state's compelling interest in compensating victims from the proceeds of crime would be better served, for example, by making available to a victim *all* the criminal's assets, however and wherever derived. Such an expansion of the resources potentially available to a victim would avoid the statute's Achilles' heel of singling out only expressive activity for a special burden. We note that victims of a crime may normally bring a civil action against the offender to recover damages. After a judgment has been obtained, a victim may proceed against the defendant's assets whether or not these assets represent royalties obtained from the commercial exploitation of the crime. The enforcement of such a civil judgment against a defendant's assets following a personal injury or property loss has not heretofore presented a First Amendment problem." (*Bouchard*, at pp. 677-678, fn. omitted.) Indeed, *Simon & Schuster* itself approved of New York's content-neutral "statutory provisions for prejudgment remedies and orders of restitution." (*Simon & Schuster*, *supra*, 502 U.S. at p. 118 [112 S.Ct. at pp. 509-510]), and the majority likewise observes the propriety of content-neutral seizure

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[3] The *Bouchard* court struck down a statute resembling New York's law in that it confiscated royalties from storytelling: i.e., " 'any publication, reenactment, dramatization, interview, depiction, explanation, or expression through any medium of communication which is undertaken for financial consideration. The term includes . . . a movie, book, magazine or newspaper article, tape recording, still photograph, radio or television program, live presentation, or reproduction or presentation of any kind.'" (*Bouchard*, *supra*, 694 A.2d at p. 674, quoting definition of "commercial exploitation" in Criminal Royalties Distribution Act of 1983, R.I. Gen. Laws § 12-25.1-2(3).)

of a defendant's assets to compensate a victim. (Maj. opn., *ante*, at p. 436, fn. 21.)

A state may thus seize a defendant's assets in a content-neutral manner to ensure compensation. "*Simon & Schuster* does not . . . stand for the proposition that the government cannot recoup the proceeds of expressive activity relating to crime. Rather, the government cannot single out those proceeds for special treatment while ignoring other assets." (*U.S. v. Seale* (3d Cir. 1994) 20 F.3d 1279, 1285, fn. 7.) Courts may thus constitutionally order restitution from sources including, but not limited to, the defendant's income from storytelling. (*Ibid.*; *U.S. v. Jackson* (5th Cir. 1992) 978 F.2d 903, 915.) The law may prevent a criminal from enjoying any of his wealth while his victim remains uncompensated.

The state may also pursue the compelling interest of depriving criminals of their profits. New York's law was defective in this regard; it did not fully deprive criminals of their profits, only those profits resulting from storytelling. If Jean Harris exploited her criminal notoriety by writing a book, the state could confiscate those royalties. If instead of telling her story she chose to exploit her notoriety by charging $25 for underwear depicting the "Scarsdale Diet" logo with a red slash through it,[4] these royalties would be protected from seizure. The law's message was not that *crime doesn't pay* but that *speaking*

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[4] (See Learned, *The Constitutionality of Cashing in on Crime: Free Expression, Free Enterprise, and Not-Profit Conditions of Probation* (1995) 1 Suffolk J. Trial & Appellate Advoc. 79, fn. 10 (Learned) [describing the $25 boxer shorts marketed by convicted call girl/panderer Heidi Fleiss].)

about crime doesn't pay. Deterring crime is a compelling state interest, deterring speech is not. The disparate treatment accorded the income from her book and from the hypothetical merchandise reveals the discriminatory nature of the New York law.

Furthermore, the discrimination undermined the compelling nature of the interest served by the law. The state could not "offer any justification for a distinction between [storytelling] and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims." (*Simon & Schuster*, *supra*, 502 U.S. at pp. 119-120 [112 S.Ct. at p. 510].) There is a compelling interest in depriving criminals of their profits, but little if any interest in limiting such deprivation to the proceeds of the wrongdoer's storytelling. (See *id.* at pp. 120-121 [112 S.Ct. at pp. 510-511].)

Whether the law pursues the compensation or antiprofit interest, a limitation on the law's scope to storytelling is the achilles' heel of a Son of Sam provision. Virginia law, therefore, bars a defendant from exploiting her criminal notoriety through any means. It seizes "[a]ny proceeds or profits received or to be received directly or indirectly by a defendant or a transferee of that defendant from any source, as a direct or indirect result of his crime or sentence, or the notoriety which such crime or sentence has conferred upon him." (Va. Code Ann. § 19.2-368.20.) Regardless of whether a Virginia criminal profited by selling her account of the crime, her autograph,[5] or her

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[5] (See *Rolling v. State ex rel. Butterworth* (Fla.Dist.Ct.App. 1999) 741 So.2d 627.)

furniture for an exorbitant price,[6] she could not enjoy such revenues under this law.[7]

Section 2225, subdivision (b)(2) similarly avoids content discrimination in its seizure of profits. In conjunction with section 2225, subdivision (a)(10), it authorizes seizure of "all income from anything sold or transferred by the felon . . . including any right, the value of which thing or right is enhanced by the notoriety gained from the commission of a felony. . . . " The statute is indifferent to the *thing's* expressive or nonexpressive character, and if expressive, its content. The majority correctly observes section 2225, subdivision (b)(2) is "clearly severable" from subdivision (b)(1) (maj. opn., *ante*, at p. 436, fn. 22), and

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[6] (See Learned, *supra*, 1 Suffolk J. Trial & Appellate Advoc. at p. 79, fn. 4 [describing sale of serial killer Jeffrey Dahmer's household goods].)

[7] Some states seizing profits do not expressly cover the fruits of criminal notoriety, instead defining as profits "any property obtained through or income generated from the commission of a crime; any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such a sale, conversion or exchange; and any property that the offender obtained by committing the crime or income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, the crime, as well as any property obtained by or income generated from the sale, conversion or exchange of the property and any gain realized by such a sale, conversion or exchange." (Me. Rev. Stat. Ann. tit. 14, § 752-E; see also Colo. Rev. Stat. Ann. § 24-4.1-201; N.Y. Crime Victims Board Law § 632-a; N.D. Cent. Code § 32-07.1-01; W. Va. Code § 14-2B-3; Wyo. Stat. Ann. § 1-40-302.) It is not evident whether proceeds from writings about subjects unrelated to the crime would qualify as "income generated as a result of having committed the crime." (Me. Rev. Stat. Ann. tit. 14, § 752-E.)

today's decision does not affect the continuing validity of the former provision.

The content neutrality of section 2225, subdivision (b)(2) is arguable, insofar as the law distinguishes between income-generating activity that exploits criminal notoriety and that which does not. For example, if Mr. Keenan published a book of poetry anonymously, the royalties would probably not qualify as profits as defined by the subdivision. But if he marketed the poems as "Sizzling Sonnets from the Sinatra Snatcher," the royalties would be enhanced by his criminal notoriety, and thus subject to seizure.[8]

On the other hand, *Simon & Schuster* observed statutes may be content neutral, and thus avoid strict scrutiny, where they are intended to serve purposes unrelated to the content of the regulated speech, notwithstanding their incidental effects on some speakers or messages but not others. (*Simon & Schuster*, *supra*, 502 U.S. at p. 122, fn. * [112 S.Ct. at pp. 511-512], citing *Ward v. Rock Against Racism* (1989) 491 U.S. 781 [109 S.Ct. 2746, 105 L.Ed.2d 661]; *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41 [106 S.Ct. 925, 89 L.Ed.2d 29].) Although New York's law was too overinclusive to qualify, a more narrowly drawn statute might face only intermediate scrutiny under *Ward* and *Renton*. (*Simon & Schuster*, *supra*, at p. 122, fn. * [112 S.Ct. at pp. 511-512].) Moreover, even if held to be content based, a statute that pursues a

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[8] Statutes that exclude from coverage works about topics unrelated to the crime would face an even stronger challenge, as the topic (content) would determine whether the state seized the royalties.

compelling interest (depriving criminals of all their profits) and is narrowly drawn (seizing only profits) could survive strict scrutiny.

A law that neutrally seizes all profits of crime comports with *Simon & Schuster*, *supra*, 502 U.S. 105 and thus the First Amendment. Even when his victim has been fully compensated, a criminal is not entitled to profit from his crimes.

As the foregoing analysis shows, a state may constitutionally seize assets by pursuing the compelling interest of compensating victims, in which case the state may seize assets from any source (including assets that are not the fruits of the crime) up to the amount of the victim's damages. Likewise, a state may constitutionally seize assets by pursuing the compelling interest of depriving criminals of assets that are the fruits of crime. And there is no apparent reason why a state must select only one compelling interest to pursue. A state may pursue both interests separately; seizing all assets up to the amount of damage under the compensation rationale, and then all fruits of crime under the antiprofit theory. Because each phase would neutrally seize assets in furtherance of a compelling state interest, the law would avoid the constitutional pitfalls noted in *Simon & Schuster*.

Cal. 2002.

BARRY KEENAN, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; FRANK SINATA, [sic] JR., Real Party in Interest.

72 Cal.App.4th 681

BARRY KEENAN, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; FRANK SINATRA, JR., Real
Party in Interest. **[Reprinted without change for tracking pending review and disposition by the Supreme Court.]**

No. B128379.

Court of Appeal, Second District, Division 1, California.

May 27, 1999.

COUNSEL

Rohde & Victoroff and Stephen F. Rohde for Petitioner.

No appearance for Respondent.

Corbett & Steelman, Richard B. Specter and Mark M. Monachino for Real Party in Interest.

VOGEL (Miriam A.), J.

The issue in this case is whether Civil Code section 2225 (California's "Son of Sam" statute) is constitutionally overinclusive. We hold that it is not, and also hold that it may be applied to a story based upon a crime that occurred before its enactment.

Facts

Frank Sinatra, Jr., was kidnapped in 1963. His captors (one of whom was Barry Keenan) demanded

ransom, which was paid by Sinatra's father. Keenan was apprehended, tried, convicted of kidnapping (a felony), and sentenced to federal prison. He completed his sentence and was released. In January 1998, Sinatra learned that Keenan had entered an agreement with New Times, Inc., pursuant to which Keenan was to be interviewed by Peter Gilstrap (a reporter for New Times Los Angeles magazine) for a story about the 1963 kidnapping, which was to be offered for sale to the media, with the profits to be shared by Keenan, Gilstrap and New Times. The January 15 issue of New Times Los Angeles carried an article by Gilstrap about the kidnapping (*Snatching Sinatra*). Shortly thereafter, Keenan, Gilstrap and New Times sold the movie rights to *Snatching Sinatra* to Columbia Pictures.

Sinatra's lawyers objected to Columbia's payment of money to Sinatra's kidnappers and demanded Sinatra's "beneficiary's interest" under Civil Code section 2225.[1]

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[1] Unless otherwise stated, all further section references are to the Civil Code. As relevant at this point, section 2225 provides that "[a]ll proceeds from the preparation for the purpose of sale, the sale of the rights to, or the sale of materials that include or are based on the story of a felony for which a convicted felon was convicted, shall be subject to an involuntary trust for the benefit of the beneficiaries set forth in this section. That trust shall continue until five years after the time of payment of the proceeds to the felon or five years after the date of conviction, whichever is later. If an action is filed by a beneficiary to recover his or her interest in a trust within those time limitations, the trust character of the property shall continue until the conclusion of the action. At the end of the five-year trust period, any proceeds which remain in trust that have not been claimed by a beneficiary shall be transferred to the Controller. . . . " (§ 2225, subd. (b)(1).) "'Convicted felon' means any person convicted of a felony, or found not guilty by reason of insanity of a felony committed in California, either by a court or jury trial or by entry of a plea in court." (§ 2225, subd. (a)(1).) "'Beneficiary' means a person who, under applicable law, other than the

(Continued on following page)

When Columbia refused to turn over any money to Sinatra without a court order, Sinatra filed this action against Keenan, Gilstrap, New Times and Columbia. A week later, Sinatra asked for and was granted a preliminary injunction directing Columbia to withhold any payments due to Keenan pending the resolution of this action.

Keenan demurred and moved to dissolve the preliminary injunction, contending that section 2225 violates his constitutional free speech rights and the constitutional prohibition against ex post facto legislation. The trial court rejected Keenan's arguments, overruled the demurrer, denied the motion to dissolve the preliminary injunction, and directed Keenan to answer Sinatra's complaint. Keenan then filed a petition for a writ of mandate in which he asked us to direct the trial court to issue the opposite orders. We decided that this was an appropriate case for early review, and therefore issued an order to show cause and set the matter for hearing.

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provisions of this section, has or had a right to recover damages from the convicted felon for physical, mental, or emotional injury, or pecuniary loss proximately caused by the convicted felon as a result of the crime for which the felon was convicted." (§ 2225, subd. (a)(4)(A).) "'Materials' means books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind." (§ 2225, subd. (a)(6).) "'Story' means a depiction, portrayal, or reenactment of a felony and shall not be taken to mean a passing mention of the felony, as in a footnote or bibliography." (§ 2225, subd. (a)(7).)

Discussion

I.

Keenan contends the statute impermissibly interferes with his rights under the First Amendment of the United States Constitution. We disagree.

A.

"In the summer of 1977, New York was terrorized by a serial killer popularly known as the Son of Sam. The hunt for the Son of Sam received considerable publicity, and by the time David Berkowitz was identified as the killer and apprehended, the rights to his story were worth a substantial amount. Berkowitz's chance to profit from his notoriety while his victims and their families remained uncompensated did not escape the notice of New York's Legislature." (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.* (1991) 502 U.S. 105, 108 [112 S.Ct. 501, 504, 116 L.Ed.2d 476].) New York quickly enacted a statute, thereafter to be known as the first "Son of Sam" law, to "'ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.'" (*Ibid.*)

New York's Son of Sam law, as later amended, required any entity contracting with an accused or convicted person for a depiction of the crime to submit a copy of the contract to the New York State Crime Victims Board, and to turn over any income under that contract to the Board, which in turn was required to deposit the money into an escrow account for the benefit of and

payable to specified victims.[2] (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., supra,* 502 U.S. at p. 109 [112 S.Ct. at pp. 504-505].) Between 1977 (when it was enacted) and 1991 (when New York's Son of Sam law was before the United States Supreme Court), the statute was "invoked only a handful of times. As might be expected, the individuals whose profits the [state of New York] sought to escrow [had] all become well known for having committed highly publicized crimes. These include[d] Jean Harris, the convicted killer of 'Scarsdale Diet' Doctor Herman Tarnower; Mark David Chapman, the man convicted of assassinating John Lennon; and R.

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[2] As relevant, the Son of Sam Law considered by the United States Supreme Court (N.Y. Exec. Law § 632-a) included these provisions: "Every . . . legal entity contracting with any person . . . accused or convicted of a crime in [the state of New York], with respect to the reenactment of such crime, by way of a movie, book, magazine article, . . . radio or television presentation, . . . or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the [New York Crime Victims Board] and pay over to the board any moneys which would otherwise, by the terms of such contract, be owing to the person so accused or convicted or his representatives." (*Id.,* subd. (1).) The Board was required to deposit the payments into an escrow account "for the benefit of and payable to any victim . . . provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such [accused or convicted] person or his representatives." (*Ibid.*) After five years from the date on which the escrow account was established, if no actions were pending, the Board was required to "immediately pay over any moneys in the escrow account to such [accused or convicted] person or his legal representatives." (*Id.,* subds. (4), (7).) A "person convicted of a crime" was defined to include "any person convicted of a crime in [the state of New York] either by entry of a plea of guilty or by conviction after trial and any person who . . . voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." (*Id.,* subd. (10)(b).)

Foster Winans, the former Wall Street Journal columnist convicted of insider trading. Ironically, the statute was never applied to the Son of Sam himself; David Berkowitz was found incompetent to stand trial, and the statute at that time applied only to criminals who had actually been convicted.... According to the [state of New York], Berkowitz [nevertheless] voluntarily paid his share of the royalties from the book Son of Sam, published in 1981, to his victims or their estates." (*Id.* at p. 111 [112 S.Ct. at p. 506].)

The Son of Sam law (as amended to include those "accused" as well as those "convicted") reached the United States Supreme Court after the state of New York learned that admitted organized crime figure Henry Hill had entered a contract with Nicholas Pileggi for the production of a book about Hill's life and that they, in turn, had signed a contract with Simon & Schuster, Inc.[3] The result of Hill

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[3] "Looking back from the safety of the Federal Witness Protection Program, Henry Hill recalled: 'At the age of twelve my ambition was to be a gangster. To be a wiseguy. To me being a wiseguy was better than being president of the United States.' N. Pileggi, Wiseguy: Life in a Mafia Family 19 (1985) .... Whatever one might think of Hill, at the very least it can be said that he realized his dreams. After a career spanning 25 years, Hill admitted engineering some of the most daring crimes of his day, including the 1978-1979 Boston College basketball point-shaving scandal, and the theft of $6 million from Lufthansa Airlines in 1978, the largest successful cash robbery in American history .... Most of Hill's crimes were more banausic: He committed extortion, he imported and distributed narcotics, and he organized numerous robberies. [¶] Hill was arrested in 1980. In exchange for immunity from prosecution, he testified against many of his former colleagues. Since his arrest, he has lived under an assumed name in an unknown part of the country." (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., supra,* 502 U.S. at p. 112 [112 S.Ct. at p. 506].)

and Pileggi's collaboration was Wiseguy, which depicts, in colorful detail, the day-to-day existence of organized crime, primarily in Hill's first-person narrative.[4] After an investigation, the state of New York ordered Simon & Schuster to suspend all payments to Hill. Simon & Schuster, in turn, filed a declaratory relief action in which it claimed the Son of Sam statute violated the First Amendment. Ultimately, the United States Supreme Court concluded that New York's Son of Sam statute, as then drafted, was overinclusive. (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., supra,* 502 U.S. at p. 115 [112 S.Ct. at pp. 507-508].) As relevant, this is what *Simon & Schuster* holds:

"A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. . . . [¶] . . . In the context of financial regulation, . . . the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. . . . The First Amendment presumptively places this sort of discrimination beyond the power of the government. . . . '"The constitutional right of free expression is . . . intended

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[4] "Throughout Wiseguy, Hill frankly admits to having participated in an astonishing variety of crimes. He discusses, among other things, his conviction of extortion and the prison sentence he served . . . . [¶] . . . [¶] Wiseguy was reviewed favorably [and a] few years later, the book was converted into a film called Goodfellas, which won a host of awards as the best film of 1990. [¶] From Henry Hill's perspective, however, the publicity generated by the book's success proved less desirable. The [New York] Crime Victims Board learned of Wiseguy in January 1986, soon after it was published." (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., supra,* 502 U.S. at pp. 113-114 [112 S.Ct. at pp. 506-507], italics added.)

to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'" . . .

"The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content. Whether the First Amendment 'speaker' is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content." (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., supra,* 502 U.S. at pp. 115-116 [112 S.Ct. at p. 508].)

"The Son of Sam law establishes a financial disincentive to create or publish works with a particular content. In order to justify such differential treatment, 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' . . . [¶] The [state of New York] disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers. . . . As we have often had occasion to repeat: '"[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."' . . . The [state of New York] thus does not assert any interest in limiting

whatever anguish Henry Hill's victims may suffer from reliving their victimization.

"There can be little doubt, on the other hand, that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them. Every State has a body of tort law serving exactly this interest. The State's interest in preventing wrongdoers from dissipating their assets before victims can recover explains the existence of the State's statutory provisions for prejudgment remedies and orders of restitution. . . . [¶] The State likewise has an undisputed compelling interest in ensuring that criminals do not profit from their crimes. Like most if not all States, New York has long recognized the 'fundamental equitable principle' . . . that '[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.' . . . The force of this interest is evidenced by the State's statutory provisions for the forfeiture of the proceeds and instrumentalities of crime. . . . [¶] . . . We . . . conclude that the State has a compelling interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims." (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., supra,* 502 U.S. at pp. 118-119 [112 S.Ct. at pp. 509-510].)

"*In short, the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about crime. We must therefore determine whether the Son of Sam law is narrowly tailored to advance the former, not the latter, objective.* [¶] As a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam

law is significantly overinclusive. *As counsel for the* [*State*] conceded at oral argument, the statute applies to works on any subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally. . . . In addition, the statute's broad definition of 'person convicted of a crime' enables the [State] to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted. . . .

"These two provisions combine to encompass a potentially very large number of works. Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as The Autobiography of Malcolm X, which describes crimes committed by the civil rights leader before he became a public figure; Civil Disobedience, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the Confessions of Saint Augustine, in which the author laments 'my past foulness and the carnal corruptions of my soul,' one instance of which involved the theft of pears from a neighboring vineyard. . . .

"Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the [State] would control his entire income from the book for five years, and would make that income available to all of the author's creditors, despite the fact that the statute of limitations for this minor incident had long since run. That the Son of Sam law can produce such an outcome indicates that the statute is, to say the least, not narrowly tailored to achieve the State's objective of compensating crime victims from

the profits of crime." (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., supra,* 502 U.S. at pp. 120-123 [112 S.Ct. at pp. 511-512], italics added.)

"The Federal Government and many of the States have enacted statutes designed to serve purposes similar to that served by the Son of Sam law. Some of these statutes may be quite different from New York's, and we have no occasion to determine the constitutionality of these other laws. We conclude simply that in the Son of Sam law, New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. *The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment.*" (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., supra,* 502 U.S. at p. 123 [112 S.Ct. at p. 512], italics added.)

B.

Keenan "accepts the Supreme Court's conclusion that 'the State has a compelling interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims,'" and concedes that section 2225 "purports to serve the same compelling purpose identified by the Supreme Court [with regard to New York's Son of Sam law]." As a result, Keenan's First Amendment contention is limited to one point, and only one point –

that California's statute, like New York's Son of Sam law, is overinclusive. We disagree.[5]

According to *Simon & Schuster*, the New York statute was overinclusive (1) because it applied to works on any subject, provided they expressed the "author's thoughts or recollections about his crime, however tangentially or incidentally," (2) because the statute's broad definition of "person convicted of a crime" enabled the state of New York to seize the income of any author who admitted in his work that he had "committed a crime, whether or not the author was ever actually accused or convicted," and (3) because an author's admission of a youthful offense would permit the State to "control his entire income from the book for five years, and would make that income available to all of the author's creditors, despite the fact that the statute of limitations for this minor incident had long since run." (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., supra,* 502 U.S. at pp. 121-123 [112 S.Ct. at pp. 511-512].)

Our statute does not include any of these defects. Section 2225 is not triggered by a "tangential" or "incidental" reference to a past criminal act. To the contrary, a

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[5] Keenan says *Simon & Schuster* holds that an "underinclusive" statute (as well as one that is overinclusive) may violate the First Amendment. He is wrong. The majority opinion in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., supra,* 502 U.S. 105, is decided solely on the basis of overinclusiveness, and the justices expressly refused to decide the issue of underinclusiveness. (*Id.* at p. 122, fn. * [112 S.Ct. at pp. 511-512].) Since Keenan does not otherwise elaborate on the issue of underinclusiveness, we do not reach that point. And since Keenan's attack on section 2225 is limited to those issues considered in *Simon & Schuster*, our discussion of the statute is similarly limited.

convicted felon's ability to profit from his crimes is affected only when he sells the "story of a felony for which [he] was convicted." (§ 2225, subd. (b)(1).) "Story" is defined as "a depiction, portrayal, or reenactment of a felony," and any "passing mention of the felony, as in a footnote or bibliography," is expressly excluded. (§ 2225, subd. (a)(7).) Moreover, section 2225 narrowly defines a "convicted felon" as someone who has been "convicted of a felony, or found not guilty by reason of insanity of a felony." (§ 2225, subd. (a)(1).) Stated another way, our statute does not allow the state to escrow or otherwise confiscate the income of an author who was never actually accused or convicted. Indeed, the only preconviction remedy available under section 2225 is a motion for a preliminary injunction regarding a person against whom a felony indictment or information has been filed, and then only when a potential beneficiary or the Attorney General can establish (1) probable cause to believe that the proceeds of a story would be subject to an involuntary trust upon conviction of the person charged, and (2) that the injunction is necessary to prevent waste. (§ 2225, subd. (f)(2).)

It follows that Keenan's claim of overinclusiveness was properly rejected by the trial court.[6]

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[6] We summarily reject Keenan's conclusory and unsupported assertion that section 2225 constitutes a prohibited prior restraint of speech in violation of the free speech clause of the California Constitution. (Cal. Const., art. I, § 2.) Section 2225 does not restrain storytelling, publication or dissemination.

II.

Keenan's crimes were committed in 1963. Section 2225 was enacted in 1986. (Stats. 1986, ch. 820, § 8, p. 2730.) His story deal was made in 1997 or 1998. It follows, he says, that the application of the statute to his story about his 1963 crimes violates the ex post facto prohibitions of both the federal and state constitutions by imposing an additional punishment that did not exist in 1963. He is mistaken.

Although "ex post facto" literally encompasses any law passed "after the fact," it has long been recognized by the United States Supreme Court "that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." (*Collins v. Youngblood* (1990) 497 U.S. 37, 41 [110 S.Ct. 2715, 2718, 111 L.Ed.2d 30], italics omitted.)[7] For this reason, the ex post facto prohibition applies to (1) penal legislation that "'punishes as a crime an act previously committed, which was innocent when done,'" (2) penal legislation that "'makes more burdensome the punishment for a crime, after its commission,'" and (3) penal legislation that "'deprives one charged with crime of any defense available according to law at the time when the act was committed.'" (*Id.* at p. 42 [110 S.Ct. at p. 2719].) The fact that legislation "'alters the situation of a party to his disadvantage'" is legally irrelevant to the determination whether the statute violates the ex post facto prohibition. (See *People v. McVickers* (1992) 4 Cal.4th

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[7] *Collins v. Youngblood, supra,* 497 U.S. 37, clarifies the "confusion" that existed in earlier ex post facto decisions. (*Id.* at p. 45 [110 S.Ct. at pp. 2720-2721].) For this reason, we do not discuss the pre-*Collins* cases cited by Keenan.

81, 84 [the same analysis applies under the California Constitution].)

Section 2225 is not "penal legislation" because it was enacted to accomplish a "legitimate governmental purpose" unrelated to punishment – as Keenan concedes, the purpose of the statute is to prevent convicted criminals from profiting from their own wrongs, and to redirect such profits to those who were victimized by the criminal's wrongful acts. (*People v. McVickers, supra,* 4 Cal.4th at pp. 84-89; see also *Jones v. Murray* (4th Cir. 1992) 962 F.2d 302, 309; *U.S. v. Bodre* (1st Cir. 1991) 948 F.2d 28, 32; *State v. Burke* (1991) 109 Or.App. 7; *Payne v. Fairfield Hills Hosp.* (1990) 215 Conn. 675; *State v. Noble* (1992) 171 Ariz. 171.) Section 2225 does not retroactively alter the definition of any crime or increase the punishment for any criminal act.

It follows that Keenan's demurrer was properly overruled.[8]

Disposition

The petition is denied. The order to show cause is vacated and the stay previously issued is dissolved. Sinatra is entitled to his costs of these writ proceedings.

Ortega, Acting P. J., and Masterson, J., concurred.

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[8] Keenan's request to us for an order dissolving the preliminary injunction is based almost entirely on the legal arguments rejected in the text, and we deny that request for the reasons previously stated.

Cal.App.2.Dist.,1999.

BARRY KEENAN, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; FRANK SINATRA, JR., Real Party in Interest. **[Reprinted without change for tracking pending review and disposition by the Supreme Court.]**

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years

of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

California Civil Code

§ 2225. Definitions; proceeds from sale of story of felony; involuntary trust; action to recover proceeds; transfer to Controller; allocation to Restitution Fund; violations; remedies cumulative; limitations of actions

(a) As used in this section:

(1) "Convicted felon" means any person convicted of a felony, or found not guilty by reason of insanity of a felony committed in California, either by a court or jury trial or by entry of a plea in court.

(2) "Felony" means a felony defined by any California or United States statute.

(3)(A) "Representative of the felon" means any person or entity receiving proceeds or profits by designation of that felon, on behalf of that felon, or in the stead of that felon, whether by the felon's designation or by operation of law.

(B) "Profiteer of the felony" means any person who sells or transfers for profit any memorabilia or other property or thing of the felon, the value of which is enhanced by the notoriety gained from the commission of the felony for which the felon was convicted. This subparagraph shall not apply to any media entity reporting on the felon's story or on the sale of the materials, memorabilia, or other property or thing of the felon. Nor shall it apply to the sale of the materials, as the term is defined in paragraph (6), where the seller is exercising his or her first amendment rights. This subparagraph also shall not apply to the sale or transfer by a profiteer of any other expressive work protected by the First Amendment unless the sale or transfer is primarily for a commercial or speculative purpose.

(4)(A) "Beneficiary" means a person who, under applicable law, other than the provisions of this section, has or had a right to recover damages from the convicted felon for physical, mental, or emotional injury, or pecuniary loss proximately caused by the convicted felon as a result of the crime for which the felon was convicted.

(B) If a beneficiary described in subparagraph (A) has died, "beneficiary" also includes a person or estate entitled to recover damages pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure.

(C) If a person has died and the death was proximately caused by the convicted felon as a result of the crime for which the felon was convicted, "beneficiary" also includes a person described in Section 377.60 of the Code of Civil Procedure and any beneficiary of a will of the decedent who had a right under that will to receive more than 25 percent of the value of the estate of the decedent.

(5) "Beneficiary's interest" means that portion of the proceeds or profits necessary to pay the following:

(A) In the case of a beneficiary described in subparagraph (A) or (B) of paragraph (4), those damages that, under applicable law, other than the provisions of this section, the beneficiary has or had a right to recover from the convicted felon for injuries proximately caused by the convicted felon as a result of the crime for which the felon was convicted.

(B) In the case of a beneficiary described in subparagraph (C) of paragraph (4), those damages that, under all the circumstances of the case, may be just.

(C) A beneficiary's interest shall be reduced by the following amount:

(i) Money paid to the beneficiary from the Restitution Fund because of the crime for which the felon was convicted.

(ii) Money paid to the beneficiary by the convicted felon because of a requirement of restitution imposed by a court in connection with the crime for which the felon was convicted.

(iii) Money paid to the beneficiary because of a judgment against the convicted felon based upon the crime for which the felon was convicted.

(D) In the case of an unsatisfied existing judgment or order of restitution against the convicted felon and in favor of a beneficiary, any money paid to the beneficiary pursuant to this section shall be applied to reduce the amount of the unsatisfied judgment or order.

(6) "Materials" means books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind.

(7) "Story" means a depiction, portrayal, or reenactment of a felony and shall not be taken to mean a passing mention of the felony, as in a footnote or bibliography.

(8) "Sale" includes lease, license, or any other transfer or alienation taking place in California or elsewhere.

(9) "Proceeds" means all fees, royalties, real property, or other consideration of any and every kind or

nature received by or owing to a felon or his or her representatives for the preparation for the purpose of sale of materials, for the sale of the rights to materials, or the sale or distribution by the convicted felon of materials whether earned, accrued, or paid before or after the conviction. It includes any interest, earnings, or accretions upon proceeds, and any property received in exchange for proceeds.

(10) "Profits" means all income from anything sold or transferred by the felon, a representative of the felon, or a profiteer of the felony, including any right, the value of which thing or right is enhanced by the notoriety gained from the commission of a felony for which a convicted felon was convicted. This income may have been accrued, earned, or paid before or after the conviction. However, voluntary donations or contributions to a defendant to assist in the defense of criminal charges shall not be deemed to be "profits," provided the donation or contribution to that defense is not given in exchange for some material of value.

(b)(1) All proceeds from the preparation for the purpose of sale, the sale of the rights to, or the sale of materials that include or are based on the story of a felony for which a convicted felon was convicted, shall be subject to an involuntary trust for the benefit of the beneficiaries set forth in this section. That trust shall continue until five years after the time of payment of the proceeds to the felon or five years after the date of conviction, whichever is later. If an action is filed by a beneficiary to recover his or her interest in a trust within those time limitations, the trust character of the property shall continue until the conclusion of the action. At the end of the five-year trust period, any proceeds that remain in trust that have not

been claimed by a beneficiary shall be transferred to the Controller, to be allocated to the Restitution Fund for the payment of claims pursuant to Section 13969 of the Government Code.

(2) All profits shall be subject to an involuntary trust for the benefit of the beneficiaries set forth in this section. That trust shall continue until five years after the time of payment of the profits to the felon or five years after the date of conviction, whichever is later. If an action is filed by a beneficiary to recover his or her interest in a trust within those time limitations, the trust character of the property shall continue until the conclusion of the action. At the end of the five-year trust period, any profits that remain in trust that have not been claimed by a beneficiary shall be transferred to the Controller, to be allocated to the Restitution Fund for the payment of claims pursuant to Section 13969 of the Government Code.

(3) Notwithstanding paragraph (2), in the case of a sale or transfer by a profiteer of the felony, the court in an action under subdivision (c) shall, upon an adequate showing by the profiteer of the felony, exclude from the involuntary trust that portion of the profits that represents the inherent value of the memorabilia, property, or thing sold or transferred and exclusive of the amount of the enhancement to the value due to the notoriety of the convicted felon.

(c)(1) Any beneficiary may bring an action against a convicted felon, representative of the felon, or a profiteer of a felony to recover his or her interest in the trust established by this section.

(2) That action may be brought in the superior court of the county in which the beneficiary resides, or of the

county in which the convicted felon resides, or of the county in which proceeds or profits are located.

(3) If the court determines that a beneficiary is entitled to proceeds or profits pursuant to this section, the court shall order the payment from proceeds or profits that have been received, and, if that is insufficient, from proceeds or profits that may be received in the future.

(d) If there are two or more beneficiaries and if the available proceeds or profits are insufficient to pay all beneficiaries, the proceeds or profits shall be equitably apportioned among the beneficiaries taking into account the impact of the crime upon them.

Prior to any distribution of any proceeds to a beneficiary, the court shall determine whether the convicted felon has failed to pay any portion of a restitution fine or penalty fine imposed by a court, or any restitution imposed as a condition of probation. The court shall also determine whether the felon is obligated to reimburse a governmental entity for the costs of his or her defense and whether a portion of the proceeds is needed to cover his or her reasonable attorney's fees incurred in the criminal proceeding related to the felony, or any appeal or other related proceeding, or in the defense of the action brought under this section. The court shall order payment of these obligations prior to any payment to a beneficiary, except that 60 percent of the proceeds or profits shall be reserved for payment to the beneficiaries.

(e)(1) The Attorney General may bring an action to require proceeds or profits received by a convicted felon to be held in an express trust in a bank authorized to act as a trustee.

(2) An action may be brought under this subdivision within one year after the receipt of proceeds or profits by a convicted felon or one year after the date of conviction, whichever is later.

That action may be brought in the superior court of any county in which the Attorney General has an office.

(3) If the Attorney General proves that the proceeds or profits are proceeds or profits from the sale of a story or thing of value that are subject to an involuntary trust pursuant to this section, and that it is more probable than not that there are beneficiaries within the meaning of this section, the court shall order that all proceeds or profits be deposited in a bank and held by the bank as trustee of the trust until an order of disposition is made by a court pursuant to subdivision (d), or until the expiration of the period specified in subdivision (b).

(4) If the Attorney General prevails in an action under this subdivision, the court shall order the payment from the proceeds or profits to the Attorney General of reasonable costs and attorney's fees.

(f)(1) In any action brought pursuant to this section, upon motion of a party the court shall grant a preliminary injunction to prevent any waste of proceeds or profits if it appears that the proceeds or profits are subject to the provisions of this section, and that they may be subject to waste.

(2) Upon motion of the Attorney General or any potential beneficiary, the court shall grant a preliminary injunction against a person against whom an indictment or information for a felony has been filed in superior court to prevent any waste of proceeds or profits if there is

probable cause to believe that the proceeds or profits would be subject to an involuntary trust pursuant to this section upon conviction of this person, and that they may be subject to waste.

(g) Any violation of an order of a court made pursuant to this section shall be punishable as contempt.

(h) The remedies provided by this section are in addition to other remedies provided by law.

No period of limitations, except those provided by this section, shall limit the right of recovery under this section.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 12/22/98

HONORABLE
STANLEY WEISBERG **JUDGE**

HONORABLE #12
R. BROWN **Deputy Sheriff**

DEPT. WEB

G. JONES DEPUTY CLERK

L. ANASTASIOU Reporter

1:30 pm SC053294

FRANK SINATRA JR.

VS

BARRY KEENAN ET AL.

Plaintiff Counsel	R. SPECTER (X)
Defendant Counsel	S. ROHDE (X) K. BRESLOW (X)

NATURE OF PROCEEDINGS:

1. DEFENDANT, BARRY KENAN'S [sic] DEMURRER TO COMPLAINT;

2. MOTION TO TO [sic] DISOLVE [sic] PRELIMINARY INJUNCTION, OR IN THE ALTERNATIVE, TO REQUIRE A WRITTEN UNDERTAKING;

The motion to dissolve is denied.

The demurrer is overruled for the reasons stated in the opposition papers.

Although the moving party is correct that the Court should consider the dissolution and or modification of the injunction due to the lack of service on him, the same result is reached. The Court already considered each of the arguments made by the moving party in determining that the injunction should issue. The Court concluded that Civil Code section 2225 was not unconstitutional as written as applied to the application for preliminary injunction. Section 2225 was narrowly drafted to overcome the over-inclusive defects found by the Supreme Court in the so called Son of Sam law in *Simon & Schuster, Inc. v. Members of The N.Y. State Crime Victims Board Case*.

The Court herein reiterates its findings as set forth in its ruling of August 5, 1998.

The Court further concludes that the application of Civil Code section 2225 herein does not constitute an ex post facto application of law. Civil Code 2225 is a civil remedy rather than penal, and the constitutional prohibition against ex post facto laws relates only to retrospective applications of criminal statutes. *U.S. v. McDonald 607 F. Supp. 1183* holds otherwise; this Court finds the reasoning of the District Court flawed and declines

to afford *McDonald* the persuasive weight moving party suggests it be given.

As to the issue of undertaking the Court notes that any proceeds will be in trust and ultimately available to moving party in the unlikely event that he prevails.

Appropriate undertaking would be $10,000 which responding party is to [sic] on or before January 8, 1999 by 5:00 p.m.

Notice by responding party.

MINUTES ENTERED
12/22/98
COUNTY CLERK

Supreme Court, U.S.
FILED
JUN 28 2002
CLERK

No. 01-1730

In the Supreme Court of the United States

FRANK SINATRA, JR.,

Petitioner,

v.

BARRY KEENAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the judgment of the California Supreme Court holding that California *Civil Code* section 2225(b)(1), which provides for the confiscation of all proceeds owing to a convicted felon if the depiction, portrayal, or re-enactment of the felony for which the criminal was convicted is included in a book, motion picture or other expressive material, is facially invalid under the Liberty of Speech clause of the California Constitution (Art. I, §2, subd. (a)) constitutes a bona fide separate, adequate and independent state ground precluding this Court's jurisdiction to review that decision

Whether the California Supreme Court correctly held that California *Civil Code* section 2225(b)(1) is overinclusive and thus facially invalid under the First Amendment, consistent with this Court's decision in *Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. 105 (1991).

STATE CONSTITUTIONAL PROVISION

In setting forth the pertinent constitutional provisions and statutes, Petitioner neglected to include Article 1, §2, subd. (a) of the California Constitution, which reads in full as follows:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

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SUPREME COURT RULES

Sup.Ct. R. 10 4

BRIEF FOR RESPONDENT IN OPPOSITION TO *PETITION FOR WRIT OF CERTIORARI*

Respondent Barry Keenan respectfully requests that the petition for certiorari be denied.

STATEMENT OF THE CASE

The California Supreme Court's unanimous opinion accurately sets forth the pertinent facts in this case. Pet. App. 6-11. Briefly stated, in July 1998 Petitioner Frank Sinatra, Jr. sued Barry Keenan under California's so-called "Son of Sam" statute, *Civil Code* section 2225. Sinatra, Jr. sought the confiscation of all proceeds due to Keenan from Columbia Pictures' production of a motion picture based on a biographical profile of Keenan which had appeared in the January, 1998 issue of *New Times* newspaper. Sinatra, Jr. alleged that under the law he was entitled to those proceeds as a result of Keenan's conviction for kidnapping Sinatra, Jr. in 1963.

On February 21, 2002, the California Supreme Court unanimously held in *Keenan v. Superior Court*, 27 Cal.4th 413, 40 P.3d 718, 117 Cal.Rptr.2d 1 (2002) that section 2225(b)(1), on which Sinatra, Jr. based his complaint, was unconstitutional under both the First Amendment to the U.S. Constitution and the Liberty of Speech Clause of the California Constitution.

Given that the decision was based on bona fide separate, adequate and independent state grounds and that the decision is entirely faithful to, and consistent with, this Court's decision in *Simon & Schuster*, we believe that the California Supreme Court decision should not be disturbed

and that the petition for certiorari should be denied.

REASONS FOR DENYING THE WRIT

A. This Court Is Without Jurisdiction Because The Judgment Of The California Supreme Court Rests On Bona Fide Separate, Adequate And Independent State Grounds

In *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), this Court articulated the "plain statement" rule to decide whether the judgment of a state court rests upon an adequate and independent state ground. Having long recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment," *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935), this Court in *Michigan* established the following rule: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision." 463 U.S. at 1041.

In the present case, the decision of the California Supreme Court squarely comes within the "plain statement" rule. Indeed, at two separate points in its decision, the California Supreme Court clearly and expressly indicated that its ruling was alternatively based on the Liberty of Speech Clause of the California Constitution, Art. I, §2, subd.(a).

First, at the very beginning of the Opinion, the California Supreme Court announced its decision in the following terms:

> We conclude that these provisions of the California statute are facially invalid under both the free speech clause of the First Amendment to the federal Constitution as applied to the states through the Fourteenth Amendment, and the liberty of speech clause of the California Constitution (Art. I, § 2, subd. (a)).

The California Supreme Court set forth in footnotes the text of the First Amendment and the Liberty of Speech Clause. 27 Cal.4th at 415-416, n.1 and 2.[1]

Second, at the conclusion of its Opinion, the California Supreme Court again clearly and expressly stated that it was also reaching its decision on the separate and independent basis of the California Constitution, in the following terms:

> We reach a similar result under the liberty of speech clause of the California Constitution (Art. I, §2, subd. (a)). The California provision provides similar, and sometimes greater, protection of speech than the First Amendment (e.g., *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal.4th 352, 366-367 & fn. 12, 993 P.2d 334),* and neither party suggests any reason why it should provide lesser protection under

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[1] If a state court "decides that a particular state action violates *both* federal and state law, the final state court judgment is not reviewable by the Supreme Court [and a] decision by the Supreme Court on the federal issue would be merely advisory." Justice O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L.Rev. 1, 5-6 (1984).

the circumstances of this case. 27 Cal.4th at 436.

Consequently, in two "plain statements" the California Supreme Court clearly and expressly indicated that as an alternative basis for its ruling under the First Amendment, it was separately basing its decision on the Liberty of Speech Clause of the California Constitution, Art. I, §2, subd.(a).

Given the "plain statements" in the California Supreme Court's decision and in adherence to the principle of avoiding advisory opinions and respecting the independence of state courts, this Court is without jurisdiction and the petition should be denied on that ground.

B. Sinatra, Jr. Has Failed To Articulate A Compelling Reason To Justify Discretionary Review By This Court Since The Decision Of The Court Below Was Correctly Decided In Accordance With This Court's Decision In *Simon & Schuster*.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Despite Sinatra, Jr.'s rhetoric and misleading characterization of the decision of the California Supreme Court, which faithfully adhered to the principles articulated by this Court in *Simon & Schuster*, Sinatra, Jr. has not presented any compelling reason to this Court to exercise its discretionary jurisdiction over his appeal from the decision of the California Supreme Court.

The California Supreme Court correctly observed that the "flaw most clearly identified by the *Simon & Schuster* majority was that the New York statute was overinclusive. [I]t confiscated all profits from expressive works in which one made even *incidental or tangential* mention of his or her past crimes for non-exploitative purposes. (*Simon & Schuster, supra*, 502 U.S. 105, 121.)" 27 Cal.4th at 417.

According to the California Supreme Court, "California's analogous provision, section 2225(b)(1), similarly imposes a content-based financial penalty on protected speech. Yet section 2225(b)(1), like its New York counterpart, fails to satisfy strict scrutiny because it, too, is overinclusive. Section 2225(b)(1) contains the fundamental defect identified in *Simon & Schuster*; it reaches beyond a criminal's profits from the crime or its exploitation to reach all income from the criminal's speech or expression on any theme or subject, if the story of the crime is included." *Id.*

The California Supreme Court reasoned, in keeping with the analysis in *Simon & Schuster,* that although section 2225(b)(1), unlike the New York law, applies only to persons actually convicted of felonies, and creates an exemption for mere "passing mention of the felony, as in a footnote or bibliography" (*id.*, subd. (a)(7)), these differences do not cure the statute's constitutional flaws. "By any reasonable construction, the California statute is still calculated to confiscate all income from a wide range of protected expressive works by convicted felons, on a wide variety of subjects and themes, simply because those works include substantial accounts of the prior felonies." *Id.*

Recognizing that under the federal Constitution, the analysis of *Simon & Schuster* governs this case, the California Supreme Court cogently compared the California statute to the

New York statute. "Both the New York and California laws impose content-based financial penalties on protected speech. Thus they must, at a minimum, satisfy strict constitutional scrutiny. Both laws seek to serve compelling interests in preventing criminals from exploiting their crimes for profit, and in compensating crime victims from the profits of crime. Yet both laws are *overinclusive* for those purposes, because they confiscate all income from all expressive materials, whatever their general themes or subjects, that include significant discussions of their creators' past crimes." 27 Cal.4th at 423.

The California Supreme Court correctly reasoned that "[a]s did the New York statute, section 2225(b)(1) penalizes the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. Even if the fruits of crime may include royalties from exploiting the story of one's crimes, section 2225(b)(1) does not confine itself to such income. Instead, it confiscates *all* a convicted felon's proceeds from speech or expression on *any* theme or subject which includes the story of the felony, except by mere passing mention. By this financial disincentive, section 2225(b)(1), like its New York counterpart, discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds." 27 Cal.4th at 431.[2]

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[2] Despite the fact that as noted above the California Supreme Court carefully analyzed the defects in the California law analogous to those found to exist in the New York law, in his petition, Sinatra, Jr. mischaracterizes the decision below, by falsely asserting that the "California court expressly acknowledges that the California law lacks the New York law's pitfalls" Pet. 6 and that the California Supreme Court "admitted" that the defects in the

Indeed, if anything, the California statute posed an even greater risk to freedom of expression than did the New York law. The California Supreme Court pointed out that in at least one respect, the involuntary trust provision of section 2225(b)(1) "operates more harshly against expressive materials that depict the creator's past crimes than did the escrow account provided for by the New York law at issue in *Simon & Schuster*. Under the New York statute, proceeds from a crime story contract were to be turned over to the New York Board for placement in escrow, but if, at the end of five years, no valid claims of the criminal's victims or creditors were pending, remaining funds in the account were returned to the criminal. (*Simon & Schuster*, *supra*, 502 U.S. 105, 109; see N.Y. Exec. Law, §632-a(4).) Under section 2225(b)(1), by contrast, any entrusted amounts not subject to legitimate individual claims at the end of the five-year trust period are turned over to the Controller for allocation to the Restitution Fund." 27 Cal.4th at 432.

Here, as below, Sinatra, Jr. argues that section 2225(b)(1) cures the overinclusiveness problem identified in *Simon & Schuster*, because it applies only to expressive materials that include the "story" of a felony for which one was convicted, and exempts mere "passing mention of the felony, as in a footnote or bibliography." (*Id.*, subd. (a)(7).) These restrictions, he claims, negate *Simon & Schuster*'s concern, that under the New York statute all profits from an expressive work would be confiscated even though the work mentioned a past offense only "tangentially or incidentally."

New York law "were not present in the California statute." Pet. 9. Despite Sinatra, Jr.'s general reference to pages 432-434 of the decision below to support these groundless claims, no such acknowledgment or admission will be found there.

The California Supreme Court bluntly responded: "We are not persuaded." 27 Cal.4th at 433.

The California Supreme Court explained that it did not read *Simon & Schuster* as suggesting that a statute which exhibited marginal narrowing in these particular regards would necessarily pass constitutional muster. "Instead, the court's concern was with the essential values of the First Amendment. As the court's lengthy discussion discloses, the vice of the New York law was that in order to serve a relatively narrow interest - compensating crime victims from the fruits of crime - the statute targeted, segregated, and confiscated *all* income from, and thus unduly discouraged, a wide range of expressive works containing protected speech on themes and subjects of legitimate interest, simply because material of a certain content - reference to one's past crimes - was included." 27 Cal.4th at 433.

The California Supreme Court correctly observed that *Simon & Schuster* made it clear that one motivated in part by compensation might discuss his or her past crimes, including those that led to felony convictions, in many contexts not directly connected to exploitation of the crime. "One might mention past felonies as relevant to personal redemption; warn from experience of the consequences of crime; critically evaluate one's encounter with the criminal justice system; document scandal and corruption in government and business; describe the conditions of prison life; or provide an inside look at the criminal underworld." 27 Cal.4th at 433.

Mention of one's past felonies in these contexts may have little or nothing to do with exploiting one's crime for profit, nor with the state's interest in compensating crime victims from the fruits of crime. Yet section 2225(b)(1) entrusts and permanently confiscates all income, whenever

received, from all expressive materials, whatever their subject, theme, or commercial appeal, that include a substantial description of such offenses, whatever their nature and however long in the past they were committed. Thus, even as so limited to felony convictions, section 2225(b)(1) is not narrowly tailored to achieve the compelling interests it purports to serve. *Id.*

Given this analysis, the California Supreme Court correctly rejected Sinatra, Jr.'s argument that the California statute avoids this defect because it applies only to expressive materials containing the "story" of the felony and because it expressly exempts mere "passing mention of the felony, as in a footnote or bibliography" on the theory that the law applies only when an expressive work provides what Sinatra, Jr. calls "narrative detail" about a felony for which the work's author or creator was convicted, and does not discourage mere "acknowledgment" of a prior felony conviction in the context of another subject. 27 Cal.4th at 434.

"These arguments do not convince us that section 2225(b)(1) focuses with sufficient precision on the fruits of crime, while leaving other speech-related income undisturbed. *Simon & Schuster* illustrated the overbreadth of the New York statute by observing that it reached even incidental and tangential mention of past crimes, but nothing in *Simon & Schuster* suggests the New York law could have cured its overinclusive effect simply by providing an exemption for tangential or incidental references. Moreover, *Simon & Schuster* neither stated nor implied that the federal Constitution might allow confiscation, on behalf of crime victims, of all proceeds from any expressive work that includes a descriptive account, or even a vivid account, of a past crime committed by the author." 27 Cal.4th at 434.

The California Supreme Court aptly pointed out that a statute that confiscates all profits from works which make more than a passing, non-descriptive reference to the creator's past crimes still sweeps within its ambit a wide range of protected speech, discourages the discussion of crime in non-exploitative contexts, and does so by means not narrowly focused on recouping profits from the *fruits of crime*. 27 Cal.4th at 435.

According to the California Supreme Court, "the statutory definition of story includes any *substantial* account of the facts and circumstances of a past felony which led to conviction, and the passing mention exemption would not provide safe harbor to materials containing such a substantial account. But there are multiple contexts in which expressive materials, with diverse subjects and themes unrelated to the exploitation of one's crimes, might include substantial accounts of those episodes." *Id.*

Sinatra, Jr. invites this Court to radically depart from its analysis in *Simon & Schuster* and create a brand new rule that would sweep within the purview of any "Son of Sam" law any book, motion picture or other expressive material in which the felon had "augmented his depiction of his crimes with additional text." Pet. 12. Of course, Sinatra, Jr. gives no hint of how legislatures, courts or interested individuals would ever determine what proportion of "additional text" compared to the space devoted to the "depiction" of the crime would cause a particular work to fall within or without of a particular statute. More importantly, since Sinatra, Jr.'s suggestion would still encompass works containing only an incidental or tangential mention of the past crime, it squarely runs afoul of this Court's holding in *Simon & Schuster*, at 502 U.S. at 121.

The California Supreme Court pointed out that section 2225(b)(1) would have applied to numerous works by authors whose discussions of larger subjects make substantial, and often vividly descriptive, contextual reference to prior felonies of which they were convicted had the statute been in effect at the time and place of these publications.[3] A statute which operates in this fashion disturbs or discourages protected speech to a degree substantially beyond that necessary to serve the state's compelling interest in compensating crime victims from the fruits of crime. Accordingly, the Court below concluded, in conformity with *Simon & Schuster*, that section 2225(b)(1) is facially invalid under the First Amendment to the United States Constitution.

Sinatra, Jr. improperly accuses the California Supreme Court of "countermand[ing]" this Court's directive in *Simon & Schuster* that its holding is not intended to invalidate all such victims' rights statutes and he imagines that the decision below "will compel that same result in the other forty (40)

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[3] These include, for example, Alex Haley and Malcolm X's *The Autobiography of Malcolm X* (Ballantine Books ed. 1992), in which the murdered civil rights leader describes early burglaries for which he was convicted (*id.*, pp. 161-172); Eldridge Cleaver's *Soul on Ice* (1968), which discusses his rapes of White women, for which he was incarcerated, as since-repented acts of racial rage (*id.*, pp. 14-15); memoirs by Charles Colson (*Born Again* (1976)), G. Gordon Liddy (*Will!* (1980)), and John Dean (*Blind Ambition: The White House Years* (1976)) detailing their criminal roles in the Watergate coverup; and the memoirs of Patricia Hearst, the scion of a publishing dynasty, who was kidnapped by the Symbionese Liberation Army and later participated with her captors in an armed bank robbery for which she was imprisoned (Hearst & Moscow, *Every Secret Thing* (1981)).

states with similar victims' rights statutes." Pet. 5. Sinatra, Jr. goes so far as to claim that the decision below "makes it impossible for any state legislature to tailor a remedy" in this area. Pet. 5.

Contrary to these spurious and exaggerated claims, the California Supreme Court itself stressed "the narrow nature" of its holding under both the federal and California Constitutions.

"We conclude only that section 2225(b)(1) is an overinclusive infringement of protected speech because it targets and confiscates *all* a convicted felon's proceeds from expressive materials that include any *substantial account* of the felony, in whatever context. We express no views on whether a statute targeting the income gained from expressive works that include accounts of the author's crimes could be drafted narrowly and precisely enough to overcome this problem of constitutional overbreadth. Moreover, nothing we say here precludes a crime victim, as a judgment creditor, from reaching a convicted felon's assets, including those derived from expressive materials that describe the crime, by generally applicable remedies for the enforcement and satisfaction of judgments. (See generally Code Civ. Proc., § § 481.010 et seq., 680.010 et seq.) Nor do we intend, by our analysis in this case, to preclude further legislative steps, not directly related to the content of speech, to ensure that a convicted felon's income and assets, including those derived from storytelling about the crimes, are and remain available to compensate persons injured or damaged by the felon's crimes." 27 Cal.4th at 436.

The California Supreme Court's decision striking down section 2225(b)(1) is not only consistent with *Simon & Schuster*, but with the decisions in other states. One

jurisdiction's "Son of Sam" law has been invalidated since *Simon & Schuster*. *Bouchard v. Price* (R.I. 1997) 694 A.2d 670, 675-678. The laws in two other states have been challenged, but the appeals in those matters were decided on grounds other than the constitutionality of the statutes at issue. See *Rolling v. State ex rel. Butterworth* (Fla.Dist.Ct.App. 1994) 630 So. 2d 635; *Curran v. Price* (Md.Ct.Spec.App. 1994) 334 Md. 149, 638 A.2d 93. Cited at 27 Cal.4th at 427.

CONCLUSION

The petition for writ of certiorari should be denied.

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In The
Supreme Court of the United States

FRANK SINATRA, JR.,

Petitioner,

vs.

BARRY KEENAN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a convicted felon's First Amendment right to freedom of speech is violated by California Civil Code section 2225(b)(1), which provides for payment to injured victims of proceeds owing to a convicted felon for the depiction, portrayal, or reenactment of his crime.

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INTEREST OF AMICUS CURIAE STATE OF CALIFORNIA

The State of California respectfully files this brief in support of petitioner, pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States.

California, like the federal government and over 30 States,[1] has enacted a criminal anti-profit statute. These statutes are commonly called "Son of Sam" laws, named after New York's statute that attempted to prevent serial killer David Berkowitz (also known as Son of Sam) and others from profiting by telling tales of their crimes. This case involves the constitutionality of a portion of California's Son of Sam law, California Civil Code section 2225.[2] That portion, section 2225(b)(1), has been in effect since the California law was first enacted in 1983.[3]

In 1991, this Court held that New York's Son of Sam law violated the First Amendment. *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105 (1991). California's Son of Sam law does not have the infirmities

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[1] See, e.g., the federal "Son of Sam" law, entitled the Victims of Crime Act of 1984, 18 U.S.C. §§ 3681-82 (1994); Ala. Code §§ 41-9-80 to -84 (1991); Alaska Stat. § 12.61.020 (1990); Ariz. Rev. Stat. Ann. §§ 13-4201 to -4202 (1989 & Supp. 1994); Colo. Rev. Stat. §§ 24-4.1-201 to -207 (1990 & Supp. 1994); Del. Code Ann. tit. 11, §§ 9101-06 (1987 & Supp. 1994); Neb. Rev. Stat. §§ 81-1835 to -1842 (1994); Ohio Rev. Code Ann. §§ 2969.01-.06 (Baldwin 1994); S.D. Codified Laws Ann. §§ 23A-28A-1 to -14 (1988 & Supp. 1995); Tenn. Code Ann. §§ 29-13-401 to -411 (Supp. 1994).

[2] The statute is set forth in the Petition for Writ of Certiorari, page 2, n. 1. Unless otherwise noted, all statutory references are to the California Civil Code.

[3] The law was first codified as section 2224.1. In 1986, it was renumbered as section 2225.

noted in *Simon & Schuster*. It is narrowly tailored to advance compelling interests of the State: (1) depriving convicted felons of fruits of their crimes, (2) compensating victims who have sustained injuries from the crimes for which the felon was convicted, and (3) providing restitution to all victims. Nevertheless, the California Supreme Court found otherwise, stating that *Simon & Schuster* "governs this case." *Keenan v. Superior Court*, 40 P.3d 718, 725 (Cal. 2002).

Justice Blackmun, in his concurring opinion in *Simon & Schuster*, noted that "[m]ost other States have similar [Son of Sam] legislation and deserve from this Court all the guidance it can render in this very sensitive area." *Simon & Schuster*, 502 U.S. at 124 (Blackmun, J., concurring). The State of California urges the Court to grant the petition for writ of certiorari, not only to correct the California Supreme Court's misinterpretation of *Simon & Schuster*, but also to clarify the law in this "very sensitive area" for Congress and the various state legislatures.

STATEMENT OF THE CASE

Amicus State of California adopts petitioner's statement of the case.

SUMMARY OF ARGUMENT

California Civil Code section 2225(b)(1) is constitutional because it is narrowly drawn to further compelling state interests. The California law thus dramatically

differs from the New York Son of Sam law, which this Court found unconstitutional in *Simon & Schuster.*

Before the California statute may be applied, there must be a convicted felon who has sold his or her story. That story must be a depiction, portrayal or reenactment of the felony for which the felon was convicted and it must be more than a passing mention of the crime. In addition, the victim-beneficiary must have sustained injury or damage proximately caused by the felon's crime.

Therefore, significantly fewer literary works are subject to the California statute than the New York Son of Sam law.

ARGUMENT

CALIFORNIA CIVIL CODE SECTION 2225(b)(1) CONFORMS WITH CONSTITUTIONAL STANDARDS, IS NARROWER THAN ITS NEW YORK COUNTERPART, AND IS NOT OVERINCLUSIVE

Under certain circumstances, government may restrict the exercise of rights under the First Amendment. However, as this Court has observed, "[T]he State must show that its regulation is *necessary to serve a compelling state interest and is narrowly drawn to achieve that end.*" *Simon & Schuster,* 502 U.S. at 118 (italics added) (citation omitted). As set forth below, there are compelling state interests for section 2225(b)(1). Moreover, the statute at issue is narrowly drawn to achieve those ends.

A. Compelling State Interests Underlie The Statute At Issue

This Court has recognized that there is a compelling state interest both in "ensuring that victims of crime are compensated by those who harm them," *Simon & Schuster,* 502 U.S. at 118, and in "ensuring that criminals do not profit from their crimes." *Id.* at 119. Section 2225(b)(1) furthers both of these legitimate interests by depriving convicted felons of the profits of their crimes when those crimes proximately cause physical, mental, or emotional injury, or pecuniary loss to the victims, and by redirecting those profits to the compensation of the victims who have sustained injuries from the crimes.

So important is California's interest in compensating victims of violent crimes, that the voters of California have codified that interest in their Constitution as part of the "Victims' Bill of Rights":

> It is the unequivocal intention of the People of the State of California that all persons *who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.*

Cal. Const. art. I, § 28(b) (italics added).

The commitment of the State of California to restitution is further evidenced by the State's Victims of Crimes statute:

> It is in the *public interest* to assist residents of the State of California *in obtaining restitution* for

> the pecuniary losses they *suffer as a direct result of criminal acts.*

Cal. Gov. Code § 13959 (italics added).[4]

Section 2225(b)(1) provides that proceeds from the sale of the felon's story are placed in a five-year involuntary trust. If the proceeds are unclaimed after that five-year period, the proceeds must be allocated to the Restitution Fund to pay claims filed by victims of crime. § 2225(b)(1).

There can be little doubt, therefore, that section 2225(b)(1) serves California's compelling interests.

B. Section 2225(b)(1) Is Narrowly Drawn To Further Those Compelling State Interests

The Court in *Simon & Schuster* found the New York Son of Sam law to be significantly overinclusive due to two provisions. First, the statute applied to works on *any subject*, if they expressed the author's thoughts or recollections about his crime, *no matter how tangentially or incidentally*. Second, persons who admitted to committing a crime, even if never convicted, were subject to the statute. Combined, those two provisions encompassed a potentially large number of works within the statute. *Simon & Schuster*, 502 U.S. at 121.

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[4] Having the felon provide restitution to his or her victim is a compelling state interest. Equally compelling is providing restitution for all victims of crimes. Thus, in situations where the felon is unknown or where the felon has inadequate resources to compensate the victim, the Victims of Crimes statute provides for a Restitution Fund against which all victims of crimes may petition to recover economic losses. Cal. Gov. Code §§ 13959-13969.2.

To dramatize how overinclusive the statute was, the Court listed numerous literary works and examples of works – many by authors who had committed minor or meaningless crimes, crimes of conscience or protest, and victimless crimes, or whose crime victims had sustained no real injury – that would fall within the scope of the New York statute. The Court included *The Autobiography of Malcolm X* (description of crimes before he became a public figure); *Civil Disobedience* (where Thoreau admits his refusal to pay taxes); and *Confessions of Saint Augustine* (a description of stealing pears from a neighbor). Also listed were examples of prominent figures whose autobiographies would be subject to the statute, including Jesse Jackson (arrested for trespass and resisting arrest after attempting to be served at a lunch counter) and Bertrand Russell (arrested for protesting against nuclear weapons).

To further emphasize the overinclusiveness of the New York Son of Sam statute, the Court posed the following hypothetical:

> Should a prominent figure write his autobiography . . . and include in an early chapter a brief recollection of having *stolen . . . a nearly worthless item* as a youthful prank, the Board would control his entire income from the book for five years, and would *make that income available to all of the author's creditors*, despite the fact that the statute of limitations for this minor incident had long since run. *That the Son of Sam law can produce such an outcome indicates that the statute is . . . not narrowly tailored to achieve the*

> *State's objective of compensating crime victims from the profits of crime.*

Simon & Schuster, 502 U.S. at 123 (italics added).[5]

California's statute does not suffer from these defects. California's statute risks application to far fewer literary works because the statute is much narrower in scope in three respects. First, unlike the sweeping New York statute, section 2225 is limited only to persons convicted of a felony, or found "not guilty by reason of insanity." Cal. Civ. Code § 2225(a)(1).[6] Second, whereas the New York statute applied to works on "any subject" if they expressed the author's "thoughts, feelings, opinions, or emotions regarding such crime, however tangentially or incidentally," the California statute applies only to a "depiction, portrayal, or reenactment of a felony"; a "passing mention of the felony, as in a footnote or bibliography" is excluded from application of the statute. Cal. Civ. Code § 2225(a)(7). Third, unlike New York, where any mention of the crime triggered the statute, a more detailed description of the events or a performance of the felony is necessary before California's section 2225(b)(1) is applicable.

A review of the examples given in *Simon & Schuster* is useful to see how much more narrowly drawn section 2225(b)(1) is than its New York counterpart. None of those examples are subject to section 2225(b)(1). Minor and meaningless crimes are not subject to the California Son of Sam

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[5] The Court's hypothetical demonstrates that, not only was New York's law overinclusive, but it would not necessarily even serve its purpose: compensation of *victims*, not *creditors*.

[6] Indeed, New York's Son of Sam law did not even require a conviction of a crime.

law because the criminal must have committed a felony. Civ. Code § 2225(a)(1). Literary works where a victim has sustained no injury or damages from the felony are not subject to section 2225. The beneficiary must have sustained "physical, mental, or emotional injury, or pecuniary loss, proximately caused" by the crime for which the felon was convicted. Civ. Code § 2225(a)(4)(A).

Not only is the California statute narrower in its scope, but the California statute does serve the compelling purposes for which it was enacted. In contrast to the New York statute, the money in the involuntary trust under California's statute is not available for general creditors of the convicted felon. At least 60 percent of the money placed in the involuntary trust must be placed in reserve for the beneficiary. The remainder may go either to California's Restitution Fund to provide restitution to all victims of crimes,[7] or to cover costs for the felon's criminal defense or defense of a cause of action brought under section 2225. Civ. Code § 2225(d).

California's Civil Code section 2225(b)(1) is, therefore, narrowly drawn to achieve its compelling state interests: (1) depriving criminals convicted of felonies of the profits

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[7] As discussed above, restitution is consistent with California's compelling state interest expressed in the California Constitution. Placing any money unclaimed by a victim-beneficiary into the Restitution Fund simply is consistent with two of California's compelling state interests: depriving convicted felons of the profits of crimes that have proximately caused physical, mental, or emotional injury, or pecuniary loss to the victims, and restitution for victims who have suffered losses. For Restitution Fund purposes, a "victim" is a person who has sustained "injury or death as a direct result of the crime," Cal. Gov. Code § 13960(a)(1), and an "injury" includes "physical or emotional injury, or both," Cal. Gov. Code § 13960(b).

of their crimes which proximately cause physical, mental, or emotional injury, or pecuniary loss to the victims; (2) compensating victims who sustained injuries from the crimes for which the felon was convicted, and (3) providing restitution for all victims.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: June 28, 2002

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